Supreme Court, U.S.
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No. 06-374

IN THE

Supreme Court of the United States

JOHN H. HOLLOWAY,
Petitioner,

v.

DOUGLAS & LYNN WOHLFAHRT,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

JOHN H. HOLLOWAY
Pro Se
10031 Timberoak Drive
Houston, Texas 77080
(713) 464-9264

Attorney for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

POINT ONE:

The Court of Appeals erred in holding that Holloway submitted a defective quantum meruit issue (Question 2-A) and erred in striking Holloway's trial court judgment for attorney's fees found by the jury.

POINT TWO:

The Supreme Court erred in affirming the opinion of the court of appeals that Holloway submitted a defective quantum meruit issue (Question 2-A) and erred in striking Holloway's judgment for attorney's fees found by the jury.

POINT THREE:

The Court of Appeals erred in refusing to pass on the error in the failure of the Wohlfahrts to object to the attorney's fee issue (Question 2-A), which resulted in the Wohlfahrts' "waiver" of any right on appeal to contest the findings of the jury to the issue.

POINT FOUR:

The Supreme Court erred in affirming the opinion of the court of appeals as to whether the Wohlfahrts "waived" any right to contest the jury's findings as to attorney's fees under Question 2-A.

POINT FIVE:

The Court of Appeals erred in reversing the N.O.V. judgment and remanding it for a new trial where the Wohlfahrts failed to plead the "discovery rule" or obtain jury findings as to the date that they discovered the counterclaims.

POINT SIX:

The Supreme Court erred in affirming the opinion of the court of appeals on the question as to whether the Wohlfahrts failed to prove the discovery rule or obtain jury findings as to the date they discovered the claims.

POINT SEVEN:

The Court of Appeals erred in reversing Holloway's N.O.V. judgment based upon the conflict in the jury findings.

POINT EIGHT:

The Supreme Court erred in affirming the opinion of the court of appeals in reversing Holloway's N.O.V. judgment based upon the conflict in the jury findings.

POINT NINE:

The Court of Appeals erred in holding that the Wohlfahrts did not waive their counterclaim by suing Holloway for legal malpractice.

POINT TEN:

The Supreme Court erred in affirming the opinion of the court of appeals that the Wohlfharts did not waive their counterclaim by suing Holloway for legal malpractice.

LIST OF PARTIES AND THEIR ATTORNEYS

JOHN H. HOLLOWAY,
Petitioner

Attorney for John H. Holloway:
John H. Holloway, pro se
10031 Timberoak Lane
Houston, Texas 77080
(713) 464-9264/Fax (713) 464-3711

DOUGLAS and LYNN WOHLFAHRT
Respondents

Attorney for the Wohlfahrts:
Levon G. Hovantanian
Martin, Disiere, Jefferson & Wisdom, LLP
808 Travis, Suite 1800
Houston, Texas 77002
(713) 632-1700/Fax (713) 322-0101

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DOUGLAS & LYNN WOHLFAHRT,

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Petition for a Writ of Certiorari to the Supreme Court of Texas

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE UNITED STATES SUPREME COURT:

JOHN H. HOLLOWAY timely files his Petition for Certiorari seeking reversal of the opinions of the court of appeals and supreme court of Texas which erred in holding that Holloway was not entitled to the standard attorney's fees awarded by the jury because he submitted a "defective" quantum meruit issue. Pursuant to Rule 13, Holloway's Petition for Certiorari was filed in this Court within 90 days after the Texas Supreme Court denied his motion for rehearing on April 21, 2006.

JUDGMENTS IN THE STATE COURTS

Holloway sued Douglas and Lynn Wohlfart for unpaid attorney's fees for handling 44 legal matters. On the first trial the appellate court erroneously reversed the case based on the court's opinion that the Wohlfahrts did not voluntarily take a non-suit as to their claim for expenses, when in fact they did. On the second trial, the Wohlfarts asserted there was a bargaining agreement to swap Wohlfahrt's medical services for Holloway's legal services, which the jury refused to find. On the second trial, the jury awarded Holloway $138,952.00 in attorney's fees on Question 2-A based upon an additional fee of $64,652 on the Schneider case which had not been closed during the first trial. The judgment was reduced by prior payment of $27,593.62. The unpaid attorney's fees of $99,776.00 plus 10% post-judgment interest resulted in a judgment of $224,203.11 as of September 24, 2006.

The Wohlfahrts appealed the second judgment to the Fourteenth Court of Appeals. The appellate court *erroneously* reversed the judgment on the basis that Holloway had submitted a "defective" quantum meruit fee issue, instead of a reasonable attorney's fee issue, and denied Holloway any attorney's fees, which was affirmed by the Supreme Court. The appellate court also reversed the trial court's judgment denying Wohlfahrts' damages.

The trial court judgment was not material to any basis for striking the damages because the trial court's judgment was related to the jury's finding as to reasonable attorney's fees. The appellate judgment also is not related to any basis for striking the damages because the appellate court erroneously held that the attorney's fees were based on quantum meruit, whereas they were clearly based on the standard attorney's fees found by the jury. Since the appellate court and the Wohlfahrts stipulated the fees were, in fact, standard attorney's fees, there was a legal obligation for the Supreme Court to affirm the trial court's judgment. The court's refusal to

articulate its denial of the federal claim is reviewable *Street v. New York*, 394 S.W. 2d 581.

HOW THE FEDERAL QUESTIONS WERE RAISED AND BASIS OF JURISDICTION OF THE UNITED STATES SUPREME COURT

Federal review of state court judgments can occur in the United States Supreme Court only by a writ of certiorari. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Holloway's state and federal constitutional rights by this Court is based upon Amend. 14, Sec. 1, U.S. Constitution, and Art. 1, Secs. 3, 13, 19 and 28, of the Texas Constitution. The review of the state judgment is mandated because of the issues of constitutional law where a Federal right has been denied as a result of a finding shown by the record to be without evidence to support it. *Fiske v. Kansas*, 274 U.S. 380 (1927).

Certiorari will be granted where (a) a decision of a United States court of appeals has determined that the decision in conflict with another federal court of appeals; has decided an important federal question in a way that conflicts with the highest state court; or has so far parted from the usual judicial proceedings; (b) a state court of last resort has decided an important federal question which conflicts with the decision of another state court of last resort; and (c) a state court has decided an important federal question that conflicts with a decision of the U. S. Supreme Court. A well-established basis for certiorari is the existence of a decision in some state court that is final.

Chief Justice Hughes in *Thompson v. City of Louisville*, 362 S.W.2d 199 (1960) stated certiorari is to "prevent grave miscarriages of justice or simply because the decision is unjust, unreasonable, or plainly wrong." That is applicable to this case because the Wohlfarts and the court of appeals held that Holloway submitted a standard attorney's fee issue, not a

defective quantum meruit issue. The case is final for review because the state court judgments destroyed Holloway's award of attorney's fees under a standard attorney's fee found by the jury (Question 2-A).

The error of the state courts in holding that Question 2-A is a defective quantum meruit issue in the face of the appellate court's findings and Wohlfahrts' judicial admissions and stipulations that Question 2-A is a standard attorney's fee issue raises a serious question of law which affects the laws of all states. In short, the Texas courts cannot manufacture a judgment contrary to the judicial admission and stipulations of the Wohlfahrts.

The opinion of the Texas courts conflict with the following constitutions of the state and federal courts:

> *Amend. 14, Sec. 1, U.S. Constitution*: "No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."
>
> *Art. 1, Sec. 13, Bill of Rights, Texas Constitution*: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."
>
> *Art. 1, Sec. 19, Bill of Rights, Texas Constitution*: "No citizen of this State shall be deprived of life, liberty, property, or privileges or immunities . . . except by the due course of law of the land."
>
> *Art. 1, Sec. 28, Bill of Rights, Texas Constitution*: "No power of suspending laws in this State shall be exercised except by the Legislature."

POINTS ONE AND TWO

I. ERROR OF THE APPELLATE COURT AND SUPREME COURT IN HOLDING THAT HOLLOWAY SUBMITTED A DEFECTIVE QUANTUM MERUIT ISSUE AND IN DENYING HOLLOWAY RECOVERY OF THE STANDARD ATTORNEY FEES FOUND BY THE JURY UNDER QUESTION 2-A.

A. Statement Under Points One And Two

The reasonableness of the fees awarded by the jury was uncontroverted. Holloway testified that each of the fees awarded by the jury in handling the 44 legal files were "reasonable and necessary" and the Wohlfahrts knew he would expect to be paid for his services. (V5/134-239; V6/121) In fact, the Wohlfahrts paid Holloway $27,593.62 for files closed prior to the suit being filed. Peter Blute confirmed Holloway's testimony. (V9/46-165) The Wohlfahrts failed to offer any testimony to controvert Holloway's and Blute's testimony.

B. Opinion And Judicial Admissions Of The Wohlfarts

1. *Opinion*

1. "There are three reasons why this question (2-A) should not be read as presenting a quantum meruit . . . cause of action: (1) it does not include the required elements; (2) its placement in the charge suggests that it is part of a breach of contract submission, and (3) at trial, Holloway denied that he was seeking recovery under quantum meruit." (OPINION 6)

2. "Second, the questions placement in the charge makes it clear that it was a submission regarding contract damages . . .Thus, it is clear that these three questions . . . should be read together as a breach of contract submission, and

'Question Two A' should not be read as a quantum meruit submission." (OPINION 7)

3. "The placement in the charge of Question 2-A suggests it was part of a breach of contract submission, and Holloway expressly denied that he was seeking recovery under quantum meruit, we hold that the charge did not submit Holloway's quantum meruit claim to the jury." (OPINION 8)

4. "Third, Holloway denied that he was seeking recovery under quantum meruit . . . Wohlfahrts' counsel suggested Holloway was seeking quantum meruit, and Holloway responded, 'I am not doing that . . . I am just on the attorney's fee pure and simple. When Wohlfahrts' attorney proposed submission of a quantum meruit claim, Holloway replied 'I don't really care,' and the judge said 'Then I will leave it out.'" (OPINION 8)

5. "Because Question Two 'A' did not include all the requirements for a quantum meruit submission, its placement in the charge suggests that it was part of a breach of contract submission, and Holloway expressly denied that he was seeking recovery under quantum meruit. WE HOLD THAT THE CHARGE DID NOT SUBMIT HOLLOWAY'S QUANTUM MERUIT CLAIM TO THE JURY. (OPINION 8)

2. *Judicial Admissions*

The court's opinion erroneously holds that Holloway submitted a DEFECTIVE "quantum meruit" issue is in direct conflict with Wohlfahrts' judicial admissions and stipulation relative to attorney's fees:

1. "Holloway points out the Wohlfahrts did not object to Question 2A, including the instruction. There was no need to object. Question 2A is a standard attorney's fee question, and Holloway had pled and requested the submission of the question on his theory that he and the Wohlfahrts agreed to enter into an attorney-client relationship whereby the Wohl-

fahrts were to pay him for his reasonable and necessary legal services . . . Thus, it was proper for the jury to receive a standard question on attorneys' fees, which is exactly what Question 2A is. * * Question 2A is not a quantum meruit question . . . the jury was not submitted a question on quantum meruit liability. There was no reason for the Wohlfahrts to challenge the jury's findings in Question 2A." (Reply brief 6)

2. "Question 2A is not a quantum meruit question . . . indeed, the jury was not submitted a question on quantum meruit liability. There was no reason for the Wohlfahrts to challenge the jury's findings in Question 2A. Holloway never requested a quantum meruit question . . . The jury was not submitted a question on quantum meruit liability. There was no reason . . . to challenge the jury's findings in Question 2A." (Reply brief 9)

3. "Question 2A is not a quantum meruit question . . . the jury was not submitted a question on quantum meruit liability. There was no reason for the Wohlfahrts to challenge the findings in Question 2A." (Reply brief 9)

C. Court's Decision

1. "Wohlfahrts' appeal from the trial court's judgment favoring John Holloway on Holloway's quantum meruit . . . cause of action. We reverse and render on Holloway's quantum meruit cause of action."

2. "Holloway did not conclusively establish his quantum meruit cause of action, and the trial court erred in entering judgment for Holloway on his quantum meruit claim."

3. "Based on the foregoing, we reverse and render the portion of the trial court's judgment awarding Holloway recovery on his quantum meruit cause of action . . ."

D. Argument And Authorities Under Points One And Two

The failure to object to a damage issue as submitting an improper measure of damage WAIVES any complaint on appeal that the jury found damages based upon the "wrong theory." *Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex., 1989); *Baptist Memorial Hosp. System v. Smith*, 822 S.W.2d 67 (Tex.App.-San Antonio 1991, *writ denied*); *Success Motivation Institute, Inc. v. Lawlis*, 503 S.W.2d 864 (Tex.App.-Houston [1st Dist.] 1973, ref.n.r.e.). *Menking v. Bishman Mfg. Co.*, 496 S.W.2d 762 (Tex.App.-Corpus Christi 1973), states:

> "In order for a party to complain on appeal that an instruction or definition was incorrect, the objection must point out distinctly the matter in which he objects and the grounds for his objection, and the same must be reduced to writing and endorsed by the trial judge."

There is no question but that Holloway is entitled to the attorney's fees found by the jury under Question 2-A and that the Courts erred in holding that Holloway's fees were based upon a defective quantum meruit issue. The opinion involves a direct conflict with the following cases cited herein and the constitutional rights of Holloway to a fair and impartial trial.

The opinion violates the judicial admissions in the opinion. The argument that Holloway submitted a "defective quantum meruit" issue is completely contrary to the opinion stating standard attorney fees were submitted and is contrary to the judicial admission in Wohlfaharts' brief that a quantum meruit issue was not submitted.

The opinion violates the "judicial admissions of the court's opinion" and the "judicial admissions in Wohlfahrts' brief." A judicial admission constitutes formal waiver of proof. It is a waiver of proof found in a pleading or opinion that relieves the other party of the proof to establish it and bears the

admitting party from disputing it. A pleading in a case is regarded as a "judicial admission".

A judicial admission is a formal act done in the course of judicial proceedings which amounts to a waiver of proof in favor of the opposing party, and *binds the declarant to an essential fact on his theory of recovery or defense.* A judicial admission in a pleading removes the admitted facts from the field of controversy. A pleading for the purpose of use in a case is a judicial admission. *De La Pena v. Elzinga*, 980 S.W.2d 920 (Tex.App.-Corpus Christi 1994); *Cadle Co. v. Castle*, 913 S.W.2d 627 (Tex.App.-Dallas 1995); *Dobbins v. Coruthers*, 864 S.W.2d 754 (Tex.App.-Houston [1st Dist.] 1993); *U.S. Fidelity & Guaranty Co. v. Carr*, 242 S.W.2d 224 (Tex.App.-San Antonio 1951). In short, a judicial admission is a formal waiver of proof found in pleadings, stipulations of parties, or judicial admissions of the court. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720 (Tex.App.-Corpus Christi 1994, writ denied).

The opinion stating that "WE HOLD THAT THE CHARGE DID NOT SUBMIT HOLLOWAY'S QUANTUM MERUIT CLAIM TO THE JURY" (OPINION 8)" is totally inconsistent with the opinion that holds that Holloway submitted a DEFECTIVE QUANTUM MERUIT ISSUE. The court cannot have it both ways.

POINTS TWO AND THREE, RESTATED AND ABRIDGED

II. ERROR IN REFUSING TO PASS ON THE FAILURE OF THE WOHLFAHRTS TO OBJECT TO THE ATTORNEY'S FEE ISSUE

A. Argument And Authorities Under Points Three And Four

The appellate court and supreme court totally ignored Holloway's point asserting the appellee court "erred in reversing

Holloway's judgment for standard attorney's fee awarded under Question 2-A because the Wohlfahrts waived any error by failing to object to the issue or the instruction." THERE IS NO VALID EXCUSE FOR IGNORING THIS POINT. Holloway submitted the following "standard attorney's fee issue." (V6, CR 1282)

Question 2-A

"In determining what is a 'reasonable attorney's fee' for services . . . by an attorney for the . . . benefit of a client in legal matters, you are instructed that you should consider the following factors in deciding the 'reasonableness' of the amount of attorney's fees to be awarded:

A. The time and labor involved, the novelty and difficulty of the legal questions involved, and the skill required to perform the legal services properly;

B. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

C. The fee customarily charged for similar legal services;

D. The amount involved and the results obtained;

E. The time limitations imposed by the client or the circumstances;

F. The nature and length of the professional relationship with the client;

G. The expertise, reputation, and ability of the lawyer performing the legal services;

H. Whether the fee is fixed or contingent before the legal services rendered."

The Wohlfahrts failed to object to the issue or the instruction and therefore "Waived" any right to complain of the issue on appeal.

"COURT: You may proceed with your objections.

SAUZO: We have objections to Questions 4, 5 and 6.

(Note: NO OBJECTIONS TO QUESTION 2-A)

COURT: And they are on the grounds that the questions are improper, they are suggestive comments on the evidence, and . . . that the broad form submission . . . tendered to the Court should be used instead of Questions 4, 5 and 6 . . . Your objection most respectfully is overruled. (V11, RR 143)

A defendant who fails to point out objectionable matter in a damage issue waives any error and cannot be heard on appeal to say that the damage issue was improper. *Dallas Ry. & Terminal Co. v. Bailey*, 250 S.W.2d 379 (Tex. 1952); *Home Ins. Co. v. Smith*, 482 S.W.2d 395 (Tex.App.-Waco 1972); *City of Shamrock v. Hrnciar*, 453 S.W.2d 898 (Tex.App.-Eastland 1970); *Strachan Shipping Co. v. Petty Geophysical Engineering Co.*, 369 S.W.2d 526 (Tex.App.-Waco 1963, ref. n.r.e.); *Jackson v. Clark*, 351 S.W.2d 292 (Tex.App.-Amarillo 1958); *White v. Southwest Coaches, Inc.*, 292 S.W.2d 823 (Tex.App.-Eastland 1956).

Guerra v. Brunlow, 630 S.W.2d 425 (Tex.App.-San Antonio 1982), states:

"Brunlow argues that the damage issue included the wrong measure of damages. The damage issue as submitted . . . inquires as to what amount of money would reasonably compensate Guerra. If there was any error in such submission, it was waived because Brumlow failed to properly object at trial. Unless a party objects to a charge on the grounds that it submits an improper measure of damages, he waives the objection and cannot complain on appeal that the charge permitted the jury to find damages based on the wrong measure."

The failure to object to a damage issue as submitting an improper measure of damage WAIVES any complaint on

appeal that the jury found damages based upon the "wrong theory." *Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex. 1989); *Baptist Memorial Hosp. System v. Smith*, 822 S.W.2d 67 (Tex.App.-San Antonio 1991, *writ denied*); *Success Motivation Institute, Inc. v. Lawlis*, 503 S.W.2d 864 (Tex.App.-Houston [1st Dist.] 1973, ref.n.r.e.). *Menking v. Bishman Mfg. Co.*, 496 S.W.2d 762 (Tex.App.- Corpus Christi 1973), states:

> "In order for a party to complain on appeal that an instruction or definition was incorrect, his objection must point out distinctly the matter in which he objects and the grounds for his objection, and the same must be reduced to writing and endorsed by the trial judge."

Where the defendant fails to object to the charge prior to its submission to the jury, defendant waives any objections on appeal and is bound by the jury verdict. *Thomas v. Morrison*, 537 S.W.2d 274 (Tex.App.-El Paso 1976, ref.n.r.e.); *Hargrove v. Texas Emp. Ins. Ass'n*, 332 S.W.2d 121 (Tex.App.-Amarillo 1960). *Pool v. Dickson*, 512 S.W.2d 68 (Tex.App.-Tyler 1974), conflicts with the present opinion, stating:

> "Appellee argues that the issue submits an improper measure of damages. As shown by the record, there was no exception or objection made to the issue complained of on this ground before the charge was submitted to the jury. *By failing to object to the issue submitting the measure of damages, appellee may not now complain that the court's charge permitted the jury to find damages based on an improper measure.* Therefore, the objection now urged has been waived by the failure to object."

Guerra v. Brunlow, 630 S.W.2d 425 (Tex.App.-San Antonio 1982), also conflicts with this case.

> " . . . The damage issue as submitted to the jury inquires as to what . . . money would reasonably compensate Guerra. *If there was any error in such submission, it*

was waived because Brunlow failed to properly object at trial. Unless a party objects to a charge on grounds that it submits an improper measure of damages, he waives the objection and cannot complain that the charge permitted the jury to find damages based on the wrong measure."

POINTS FIVE AND SIX

III. ERROR IN REVERSING THE N.O.V. JUDGMENT BECAUSE THE WOHLFAHRTS FAILED TO PLEAD THE "DISCOVERY RULE" OR OBTAIN JURY FINDINGS AS TO WHEN THEY DISCOVERED THE COUNTERCLAIMS

A. Statement And Argument Under Points Five And Six

Holloway objected to the DTPA issues because (1) there were no pleadings addressing such issues; (2) the broad issue is confusing because it is not limited to any "specific" claim relating to the suits handled by Holloway; and (3) there is no expert testimony to prove any DTPA claim relating to the handling of any of the 44 legal matters by Holloway. (Brief 40)

The appellate court concedes that the Wohlfahrts did not submit a "discovery rule" issue. (Opinion 10) In the first trial the Wohlfahrts pled the discovery rule, but in the second trial they did not. (Def.'s answer to plaintiff's second amended petition. (Pgs 46-121) It is also undisputed that Holloway pleaded "limitations" in his Sixth Amended Petition. (Pgs 34-36) Holloway's pleadings stated that "all counterclaims are barred by limitations due to the failure of the defendants to timely file a counterclaim within 30 days from the date the answers were due pursuant to Sec. 16.069, CPR code."

Holloway's attorney fee suit was filed on March 7, 1992. The Wohlfahrts filed a general denial on April 2, 1992, but alleged only that the defendants "reserve the right to file

a counterclaim." (V1, CR 17-23) *Wohlfahrts' time to file a counterclaim expired on May 2, 1992.* Wohlfahrts' First Amended Answer was filed on October 3, 1994; however, it again asserted the Wohlfahrts "reserve the right to file a counterclaim." The Wohlfahrts' first pleading asserting a DTPA claim was their First Amended Counterclaim filed on May 29, 1995, MORE THAN THREE YEARS AFTER THE DUE DATE TO FILE A COUNTERCLAIM.

The court erroneously holds that Holloway had the "burden to plead, prove, and secure findings to sustain his limitation plea." The burden was on the Wohlfahrts, not Holloway. Based upon such error, the court rendered judgment for the Wohlfahrts. *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515 (Tex. 1988), states:

> "A defendant seeking to avail itself of the discovery rule must plead the rule, either in the original answer or in an amended or supplemental answer in response to a plaintiff's plea of limitations. A matter in avoidance of the statute of limitations that is not raised affirmatively by the pleadings . . . will be deemed waived."
>
> "The party seeking the benefit of the discovery rule must bear the burden of proving and securing favorable findings thereon. * * Where, as here, the Woods neither pleaded lack of discovery nor obtained jury findings on discovery, it is waived."

The Wohlfahrts, not Holloway, had the duty to submit the Woods issue and to plead the lack of discovery. Holloway objected to the failure to submit such issues or plead the discovery rule. A defendant must specifically plead when he discovered the counterclaim. *Matthiessen v. Schaefer*, 900 S.W.2d 792 (Tex.App.-San Antonio 1995).

A counterclaim arises "when the defendant should have discovered the facts." *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991). If the action is barred by limitations when the counterclaim is filed, it will still be barred as a

counterclaim filed in an amended answer. *Babo Equip. Co. v. Bethehem Steel Corp.*, 814 S.W.2d 464 (Tex.App.-Houston [14th Dist.] 1991.

In fact, the Wohlfahrts "waived" any DTPA counterclaim in their Reply Brief in the appellate court, stating:

> "The Wohlfahrts did not allege legal malpractice in connection with any work he (Holloway) performed in their behalf. *Rather, their counterclaims are based upon Holloway's action pursuing this litigation against them.* For example, the specific acts of fraud . . . include Holloway's attempt to recover for the first time in this lawsuit attorney fees where no legal work was performed or where the work was substandard and performed solely to generate unnecessary fees."

The claims are not counterclaims, but "pure defense claims to the cause of action." *Carnes v. Transport Ins. Co.*, 615 S.W.2d 909 (Tex.App.-El Paso 1981, ref. n.r.e.).

Holloway's motion for judgment non obstante verdict asserted that the Wohlfahrts' DTPA claims were barred by limitations, as a matter of law. (V4, CR 811-818, 934-937) Holloway's 6th Amended Petition and Answer to Counterclaim, filed January 28, 2002, contained extensive limitation pleas. (V4, CR 274-330) The Wohlfahrts' "trial pleading" was their Second Amended Answer filed April 25, 2003, and it failed to assert any defense to Holloway's limitation pleas. (V3, CR 516-520) Specifically, it failed to indicate when respondents "discovered" a counterclaim. *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515 (Tex.1988), states:

> "A party seeking to avail itself of the discovery rule must plead the rule . . . in response to defendant's Assertion of the (limitation) defense as a matter of avoidance . . . A matter of avoidance of the statute of limitations that is not raised affirmatively by the pleadings will, therefore, be deemed waived. * * The party seeking to benefit from the discovery rule must bear the

> burden of proving and securing favorable findings hereon. * * Where, as here, Woods neither pleaded discovery nor obtained findings on discovery it is waived. * * Mercer established as a matter of law that Woods' cause of action was barred. Once that was done, it was Woods' burden to obtain jury findings to defeat that defense. Since Woods failed to request any findings on discovery or object to their omission, she cannot now complain that her action was not barred."
>
> "A defendant seeking to avail itself of the discovery rule must plead the rule, either in its original answer or in an amended or supplemental answer in response to a plaintiff's raising limitations. A matter in avoidance of the statute of limitations that is not raised affirmatively by the pleadings . . . will be deemed waived."
>
> "The party seeking the benefit of the discovery rule must bear the burden of proving and *securing favorable findings thereon.* * * Where, as here, the Woods neither pleaded lack of discovery nor obtained jury finding on discovery, it is waived."

A two-year statute of limitation applies to a DTPA cause of action. It accrues when the tort is committed. *McClung v. Johnson*, 620 S.W.2d 644 (Tex.App.-Dallas 1981, ref.n.r.e.). Wohlfahrts' First Amended Counterclaim filed October 3, 1994, stated that defendants "reserve the right to plead any counterclaims." (V1, 89-91) That is no more binding on the parties than if the statement was made passing on the street. The Wohfahrts' Amended Answer (trial answer) filed on April 5, 2003, did not plead any defense to limitations and, specifically, failed to plead when the Wohlfarts "discovered" their counterclaims.

The court of appeals abused its discretion in reversing and remanding the issue of "discovery" of the counterclaim based upon the argument that Holloway had the "duty to plead and obtain jury findings on such issue."

POINTS SEVEN AND EIGHT, RESTATED AND ABRIDGED

IV. HOLLOWAY'S JNOV RESOLVED A CONFLICT IN JURY FINDINGS

A. Statement, Argument & Authorities

In answer to Question 13 the jury found Holloway "had engaged in false, misleading, or deceptive acts that was a producing cause of injury to the Wohlfahrts" (V4, 795). In answer to Question 13-A, the jury found that Holloway had "engaged in unconscionable actions that was a producing cause of injury to the Wohlfahrts." (V4, 796) In answer to Question 13C the jury found that Holloway's conduct involved "unconscionable action or false, misleading, or deceptive trade practices" and by Question 13D found the Wohlfahrts had been damaged due to such conduct. (V4, 798).

However, *on the other side of the coin*, the jury refused to find that Holloway had made a "negligent misrepresentation, that the representation supplied false information for the guidance of the clients, and that the attorney in making such misrepresentation did not exercise reasonable care or competence in obtaining or communicating the information to the client." (Question 7, V4, 783) The jury also refused to find that Holloway "committed fraud on the Wohlfahrts by making a material misrepresentation, with knowledge of its falsity or made it recklessly without knowledge of the truth and as a positive assertion, and that such misrepresentation was made with the intention it should be acted on by the client, and that the client acted in reliance on such misrepresentation and suffered injury." (Question II, V4, 792)

Holloway filed a motion to disregard the findings, which was granted. The Wohlfahrts failed to file a motion to disregard the negative findings, failed to object to the issues, and failed on appeal to complain of the jury's findings under a no evidence or great weight points of error. (V11, RR 143) They "waived" any error relating to the JNOV.

POINTS NINE AND TEN, RESTATED AND ABRIDGED

V. THE WOHLFAHRTS "WAIVED" THEIR COUNTERCLAIM BY FAILING TO SUE HOLLOWAY FOR LEGAL MALPRACTICE

A. Statement, Argument & Authorities

One basis for the JNOV was that the Wohlfahrts failed to sue Holloway for legal malpractice. *Kahlig v. Boyd*, 980 S.W.2d 685 (Tex.App.-San Antonio 1998, writ dismd.). In the first appeal, the Wohlfahrts stated in their Reply Brief:

> "The Wohlfahrts did not allege legal malpractice in connection with any work performed (by Holloway) in their behalf. Rather, their counterclaims are based upon Holloway's action pursuing this litigation against them. For example, the 'specific acts of fraud' listed in Wohlfahrts' pleadings include Holloway's attempt to recover for the first time in this lawsuit attorney's fees where no legal work was performed or where the work was substandard and performed solely to generate unnecessary fees."

Where a party waives any legal malpractice claim, they also waive any claim for deceptive trade practices.

The Wohlfahrts filed an untimely counterclaim which was subject to the pleaded limitations by Holloway. The Wohlfahrts failed to plead the discovery rule or submit any issue to the jury as to when they discovered their counterclaim. Based upon such fact, the trial court granted Holloway's motion for a judgment n.o.v. and denied Wohlfahrts' claims for damages assessed against Holloway.

The reversal and rendition of opinion against Holloway is in direct conflict with well-established law holding that if a case is submitted on the wrong theory that the court can only remand, not render judgment. The opinion conflicts with *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87 (Tex.

1973), and *Samedan Oil v. Intrastate Gas Gathering*, 78 S.W.3d 425 (Tex.App.-Tyler 2001), which hold that if a question is fatally defective that the court may only remand for a new trial, not render judgment.

Samedan states:

> "*Samedan* contends that Question is fatally defective because it did not contain an instruction to the jury on the proper measure of damages. We agree. * * When a defective damages question is submitted, the proper remedy is to remand for a new trial."

The reversal and rendition conflicts with *Williams v. Safety Casualty Co.*, 102 S.W.2d 178 (Tex. 1937), holding an appellate court can render a judgment only when the parties have been properly presented and the case has been fully developed.

If a damage issue consists of more than one element and the court omits one element without objection, then the error is "waived" and the *unsubmitted elements are found in support of the judgment. Dayton Hudson Corp. v. Long*, 715 S.W.2d 624 (Tex.App.-Austin 1997, ref.n.r.e.); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535 (Tex. 1981). The court erred in reversing and rendering on a fee issue on which there was no objections to the issue and instructions and where the Wohlfahrts failed to contest the "separate findings" under a no evidence or great weight points of error. *Dallas Transit Co. v. Young*, 370 S.W.2d 6 (Tex.App.-Dallas 1961, ref.n.r.e.). The Court erroneously holds that under the law of the case doctrine that the first appeal controls the retrial of the case; however, it does not if there is a change in the facts or issues on the second trial. (Opinion 11) In the second trial the Wohlfahrts did not plead the "discovery rule" in face of Holloway's claim of limitations, a completely different trial posture. Neither did the Wohlfahrts submit an issue on the question of "lack of discovery" or obtain any jury findings on such issue.

The Court held in the first appeal that "Holloway did not provide any evidence when the Wohlfahrts discovered their cause of action." (Opinion 11) That was not an issue in the second trial because the Wohlfahrts failed to file the "discovery rule" in defense to Holloway's claim of limitations.

Finally, the two trials are entirely different because the Appellants filed the discovery rule in the first trial, but did not plead it in the second trial. The law of the case does not apply where the issues and evidence in the two trials are not the same. *Cedillo v. Gaitas*, 981 S.W.2d 388 (Tex.App.-San Antonio 1998).

Since the Wohlfahrts did not file a motion for new trial asserting error in rendering judgment n.o.v. the court lacks jurisdiction to reverse the case.

Nugent v. Moody, 272 S.W. 266 (Tex.App.-Galveston 1925), controls this case.

PRAYER

WHEREFORE, Holloway prays that the Supreme Court set aside the order denying Holloway attorney's fees and reinstate his judgment for fees assessed by the jury under Question 2-A, affirm the holdings that Wohlfahrts' counterclaims were barred by limitations, that Wohlfahrts "waived" the counterclaims by not suing Holloway for legal malpractice, and that there was no evidence to support the DTPA findings.

Respectfully submitted,

JOHN H. HOLLOWAY
Pro Se
10031 Timberoak Drive
Houston, Texas 77080
(713) 464-9264

Attorney for Petitioner

APPENDIX

APPENDIX A

COURT OF APPEALS OF TEXAS
Houston (14th Dist.)

Nos. 14-03-01084-CV, 14-03-01130-CV.

DOUGLAS WOHLFAHRT, M.D. and LYNN WOHLFAHRT,
Appellants,

v.

JOHN H. HOLLOWAY,
Appellee.

JOHN H. HOLLOWAY,
Appellant,

v.

DOUGLAS WOHLFAHRT, M.D. and LYNN WOHLFAHRT,
Appellees.

June 2, 2005

OPINION

ADELE HEDGES, *Chief Justice*.

Douglas Wohlfahrt, M.D. and Lynn Wohlfahrt appeal from the trial court's judgments favoring John Holloway on Holloway's quantum meruit and debt causes of action and the Wohlfahrts' Deceptive Trade Practices Act counterclaims. In three issues, the Wohlfahrts contend that the trial court erred in (1) granting judgment on the quantum meruit claim, (2) disregarding the jury's DTPA violation findings, and (3) calculating interest on the debt claims. Holloway brings a separate appeal from the taxation of costs in an earlier appeal in this case. We reverse and render on Holloway's quantum

meruit cause of action, reverse and remand on the Wohlfahrts' DTPA causes of action, affirm on Holloway's debt causes of action, and dismiss Holloway's appeal regarding the taxation of appellate costs.

I. Background

There is considerable dispute in the record and on appeal regarding the nature of the relationship between Holloway and the Wohlfahrts. Holloway is an attorney specializing in medical malpractice cases. Douglas Wohlfahrt is a medical doctor. It is uncontroverted that Holloway handled various legal matters for the Wohlfahrts between 1983 and 1992. It is also uncontroverted that during this time Dr. Wohlfahrt reviewed medical files for Holloway related to Holloway's legal practice, although the number and value of such reviews was hotly contested.

The Wohlfahrts testified that they had a bartering arrangement with Holloway, under which Holloway exchanged his legal services for Dr. Wohlfahrt's review of files. Holloway testified that there was no such arrangement and that the Wohlfahrts owed him for his legal services.

It is further undisputed that for certain of his services Holloway billed the Wohlfahrts and the Wohlfahrts paid him, but for other services, Holloway did not bill (until March 1992 when suit was filed) and the Wohlfahrts did not pay. Holloway filed the present lawsuit seeking recovery of his fees for services rendered over the years and for recovery of a loan he made to the Wohlfahrts. The Wohlfahrts counterclaimed alleging DTPA violations, among other things.

This is the second appeal in this lawsuit. After the first trial, the trial court ruled that the Wohlfahrts' DTPA counterclaims were barred by either section 16.069 of the Civil Practice and Remedies Code, which requires counterclaims to be filed within 30 days of the date the answer is due, or the two-year statute of limitations for DTPA claims. TEX. Bus. &

COM.CODE ANN. 17.565 (Vernon 2002); TEX. BUS. & COM. CODE ANN § 17.565 (Vernon 2002); TEX CIV. PRAC. & REM. CODE ANN. § 16.069 (Vernon 1997). On appeal, the First Court of Appeals reversed, holding that the counterclaims were not barred. *Wohlfahrt v. Hollo*way, No. 01-99-00205–CV, 2001 WL 84212 (Tex.App.-Houston [1st Dist.] 2001, pet. denied) (not designated for publication). The First Court awarded appellate costs against Holloway but remanded to the trial court for a determination of the costs for two portions of the reporter's record.

In the second trial, the jury received a voluminous charge that included 32 separately numbered questions, requiring as many as 161 separate answers.[1] In the parts relevant to this appeal, the jury found that (1) there was no bartering agreement between the parties; (2) there was no attorney-client agreement between the parties; (3) Holloway loaned money to the Wohlfahrts, and the Wohlfahrts paid some of it back; (4) Holloway knowingly engaged in a false, misleading, or deceptive act or practice that caused damages to the Wohlfahrts; and (5) Holloway knowingly engaged in an unconscionable action or course of action that caused damages to the Wohlfahrts. The jury also provided amounts for the "reasonable attorney's fee[sl" for the services rendered by Holloway for the Wohlfahrts, for the "reasonable value" of Dr. Wohlfahrt's review of medical files for Holloway, and for the "necessary services" of the Wohlfahrts' attorneys in the present lawsuit.

Post—verdict, the trial court ruled that (1) Holloway was entitled to judgment on his pled quantum meruit claim for the services he provided to the Wohlfahrts; (2) Holloway was

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[1] The questions were grouped into related blocks such as "Two," "Two 'A,'" and "Two 'B.'" Several questions also had subparts mostly, but not strictly, related to damage elements. Many of the questions went unanswered because of the jury's responses to other related questions.

entitled to judgment on his debt claims; and (3) the Wohlfahrts' counterclaims, including the DTPA claims, were time-barred. The court entered judgment accordingly, awarding Holloway $99,776 plus pre- and post—judgment interest on the fees and $16,162.22 plus pre-and post-judgment interest on the debt.

On appeal, Holloway initially contends that the Wohlfahrts waived their appeal by failing to file a proper notice of appeal. The Wohlfahrts contend that the trial court erred in granting judgment on the quantum meruit claim, disregarding the jury's DTPA violation findings, and calculating interest on the debt claim. Holloway also complains of the taxation of costs in the earlier appeal.

II. Notice of Appeal

Holloway initially argues that the Wohlfahrts' appeal should be dismissed because they failed to provide a proper notice of appeal. The trial court signed a number of final judgments in the case below. Some of the judgments superceded earlier judgments. Holloway asserts that the Wohlfahrts' notice of appeal was invalid because it was taken from earlier, superseded judgments and was riot amended to indicate the correct final judgments.[2]

However, the Texas Rules of Appellate Procedure make it clear that the Wohlfahrts were not required to file a new notice of appeal when the trial court signed new final judgments. Under Rule 25.1(a), an appeal is perfected when a notice of appeal is filed with the trial court clerk. Tex.R.App. P. 25.1(a). Further, Rule 27.3 states that

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[2] There were three cause numbers below, which were combined for trial. The original final judgments for these cause numbers were signed on June 26, 2003. The Wohlfahrts filed their notice of appeal on September 24, 2003. The trial court then signed new final judgments on September 24, 2003, and again on October 29, 2003.

> After an order or judgment in a civil case has been appealed, if the trial court modifies the order or judgment, or if the trial court vacates the order or judgment and replaces it with another appealable order or judgment, the appellate court must treat the appeal as from the subsequent order or judgment and may treat actions relating to the appeal of the first order or judgment as relating to the appeal of the subsequent order or judgment.

TEX.R.APP. P. 27.3. Thus, by operation of Rules 25.1 and 27.3, the Wohlfahrts provided a proper notice of appeal. Consequently, Holloway's argument is without merit.

III. Quantum Meruit

A. The Charge

The Wohlfahrts first contend that the trial court erred in rendering judgment for Holloway on his quantum meruit claim. The parties initially dispute whether the quantum meruit claim was submitted to the jury. *See* TEX.R. CIV. P. 279 (providing that all independent grounds of recovery not submitted or requested in the charge are waived unless conclusively proven). We find that it was not.

Quantum meruit is an equitable remedy based upon an implied promise to pay for benefits received. *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex.1992). *Myrex Indus., Inc. v. Ortolon* 126 S.W.3d 548, 550 (Tex. App.-Houston [14th Dist.] 2003, pet. denied). In order to prove quantum meruit, a party must show that (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged and used and enjoyed by him; (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged. *Vortt Explora-*

tion Co. v. Chevron U.S.A., Inc., 787 S.W.2d 942, 944 (Tex.1990); *Clear Lake City Water Auth. v. Kirby Lake Dev., Ltd.*, 123 S.W.3d 735, 753 (Tex.App.-Houston [14th Dist.] 2003, pet. denied).

Holloway maintains that the claim was submitted in Question Two "A," which asked: "What do you find to be a reasonable attorney's fee for the necessary services rendered by John H. Holloway in handling each of the following legal matters, stated in dollars and cents?" Question Two "A" also included an instruction that

> [i]n determining what is a "reasonable attorney's fee" for legal services and time expended by an attorney for the use and benefit of a client in legal matters, you are instructed that you should consider the following factors in deciding the "reasonableness" of the amount of attorney's fees to be awarded. . . .

The instruction then listed the factors required by the Texas Supreme Court to be submitted for the jury's consideration when awarding attorney's fees. *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex.1997); *see also* Comm. ON PATTERN JURY CHARGES, STATE BAR OF TEX, TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT PJC 110.43 cmt. (2003). Lastly, the question listed forty-four items or legal matters, and after each, the jury placed a dollar figure.

There are three reasons why this question should not be read as presenting a quantum meruit claim: (1) it does not include the required elements, (2) its placement in the charge suggests that it is part or a breach of contract submission, and (3) at trial, Holloway denied that he was seeking recovery under a quantum meruit theory. We shall discuss each in turn.

First, Question Two "A" does not include all of the required elements for quantum meruit; indeed, it does not appear to include any of the required elements in proper form.

See Vortt Exploration, 787 S.W.2d at 944; *Clear Lake City Water Auth.*, 123 S.W.3d at 753; PJC 101.42. Holloway argues that the court's instruction on reasonable attorney's fees satisfies the elements of quantum meruit; however, he provides no explanation for this assertion, and, at a minimum, nothing in the instruction required the jury to consider the fourth element of quantum meruit, *i.e.*, that services were rendered under such circumstances as reasonably notified the person sought to be charged that the plaintiff was expecting to be paid. *See Vortt Exploration*, 787 S.W.2d at 944; *Clear Lake City Water Auth.*, 123 S.W.3d at 753.3.[3]

Second, the question's placement in the charge makes it clear that it was a submission regarding contract damages. As explained above, the voluminous charge was divided into question groupings related to specific causes of action.[4]

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[3] Under Rule 279, if a ground of recovery consists of more than one element and one or more elements is submitted and one or more is omitted, then the omitted elements are deemed found if supported by factually sufficient evidence. TEX.R. CIV. P. 279. However, the rule further requires that for any elements of a ground of recovery to be considered submitted, the elements must be "necessarily referable thereto." *Id.*; *see also Clayton W. Williams, Jr., Inc.-v. Oliva*, 912 S.W.2d 319, 327 (Tex.App.-San Antonio 1995) (explaining that the "necessarily referable" requirement is designed to give fair notice and that if the elements are not necessarily referable to the ground of recovery urged then the ground is waived), *affd in relevant part*, 952 S.W.2d 523 (1997). As will be explained in the text following this, even if the instruction on attorney's fees could be read as including elements common to a claim of quantum meruit, the structure of the charge indicates that these elements are not necessarily referable to that cause of action. They are instead integral parts of a breach of contract submission. Because the court did not necessarily submit any elements of quantum meruit, we need not deem any remaining elements in support of the theory. *Clayton W. Williams, Jr., Inc.*, 952 S.W.2d at 529.

[4] For example, the submission on the Wohlfahrts' DTPA causes of action included Question 13, asking about false, misleading, or deceptive acts; Question 13A, asking about unconscionable actions; Question 13B, asking about damages caused; Question 13C, asking whether the con-

Question Two asked whether the parties "agree[d] to enter into an attorney-client relationship whereby the Wohlfahrts were to pay John Holloway for his reasonable and necessary legal services?" Question Two "B" asked whether "the Wohlfahrts breach[ed] this agreement with John Holloway?" Thus, it is clear that these three questions (Two, Two "A," and Two "B") should be read together as a breach of contract submission, and Question Two "A" should not be read separately as a quantum meruit submission.[5]

Third, at trial, Holloway denied that he was seeking recovery under quantum meruit. During a discussion of the relevance of certain evidence, the Wohlfahrts' counsel suggested Holloway was seeking quantum meruit, and Holloway, who was representing himself, responded, "I am not ever doing that. . . . I am just on the attorney's fees agreement pure and simple." Later, during the charge conference, when the Wohlfahrts' attorney offered a proposed submission on Holloway's quantum meruit claim, the judge said to Holloway, "You don't want quantum meruit?" Holloway replied, "I don't really care," and the judge said, "All right. Then I will leave it out."[6] These exchanges demonstrate that Hollo-

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duct was committed knowingly; and Question 13D, asking about mental anguish.

[5] Question Two "A" is not expressly contingent on a positive answer to Question Two. This apparently lead the jury to ask during deliberations whether Two "A" was contingent on their answer to Two. The judge who presided over the trial and submitted the charge was a visiting judge and was not on the bench when the jury asked this question. After conferring with the parties (who disagreed as to whether the or question should be contingent on the other), the sitting judge replied to the jury that they should just answer the charge as submitted.

Earlier, during the charge conference, the visiting judge initially conditioned Two "A" on Two but subsequently removed the condition when Holloway objected. Holloway did not mention quantum meruit in making his objection.

[6] Holloway points out that at the beginning of the charge conference

way waived submission of the quantum meruit theory in the jury charge.

Because Question Two "A" did not include all the required elements for a quantum meruit submission, its placement in the charge suggests that it was part of a breach of contract submission, and Holloway expressly denied that he was seeking recovery under quantum meruit, we hold that the charge did not submit Holloway's quantum meruit claim to the jury.

B. Conclusive Proof?

However, Holloway would still be entitled to judgment on his quantum meruit claim if he conclusively proved it. *See* TEX. R. CIV. P. 279. "An issue is conclusively established when the evidence is such that there is no room for ordinary minds to differ as to the conclusion to be drawn from it." *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex.1982); *Abraxas Petroleum Corp. v. Hornburg*, 20 S.W.3d 741, 749 n. 6 (Tex.App.-El Paso 2000, no pet).

The first three elements of quantum meruit appear to be well established in the record: it is undisputed that (1) Holloway rendered valuable services for (2) the Wohlfahrts and that (3) the Wohlfahrts accepted these services and used and enjoyed them. *See Vortt Exploration*, 787 S.W.2d at 944 (providing elements of quantum meruit recovery). However, the evidence was strongly contested regarding the fourth element: whether the circumstances were such that the Wohlfahrts were reasonably notified that Holloway expected to be paid. *See id.*

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the judge indicated that he intended to charge the jury on both breach of contract and quantum meruit; however, this statement clearly occurred before the exchange detailed above in which Holloway expressed ambivalence toward a quantum meruit submission, and the court stated that it was leaving such submission out of the charge.

Holloway points to his own testimony that the Wohlfahrts knew he expected to be paid and to the fact that he requested payment for certain services and the Wohlfahrts paid for those services. But the Wohlfahrts themselves testified repeatedly and consistently that they did not believe Holloway expected to be paid except on the few occasions when he told them that a particular service had costs out of the ordinary. On those occasions, he told them how much it was going to cost, and they paid the amount. Contrary to Holloway's assertion, the evidence that he sometimes told the Wohlfahrts that he expected to be paid and got paid is inferential evidence that on other occasions, when he did not tell them that there were extraordinary costs, he did not expect to he paid. Holloway's services for the Wohlfahrts occurred over a nine-year period: that Holloway did not submit a bill for services and demand payment until after the parties had a falling out and suit was filed is further evidence that Holloway did not expect to be paid at the time services were rendered.[7] At a minimum, it suggests that the Wohlfahrts could have reasonably believed that Holloway did not expect to be paid. Thus, there was some evidence negating the fourth element of quantum meruit. *See id.* Accordingly, Holloway did not conclusively establish his quantum meruit cause of action, and the trial court erred in entering judgment in his favor on that claim. *See* TEX. R. CIV. P. 279; *Triton Oil & Gas*, 644 S.W.2d at 446. We sustain the Wohlfahrts' first issue.

IV. "Time–Barred" DTPA Claims

The Wohlfahrts next contend that the trial court erred in holding that their DTPA counterclaims were time-barred. In

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[7] Whether this was due to the alleged, but not found, bartering arrangement, the social relationship between the parties, or some other motive of Holloway is not clear or necessary to establish in order to defeat the quantum meruit claim.

response to questions "13" and "13A," the jury found that Holloway knowingly engaged in both (1) false, misleading, or deceptive acts or practices and (2) an unconscionable action or course of action that caused damages to the Wohlfahrts. In response to Question "13B," the jury found that Holloway's conduct caused the Wohlfahrts $4,469 in monetary damages, and in response to "13D," the jury found $100 in mental anguish damages. The court did not submit, and the parties did not request, any question regarding the accrual of the Wohlfahrts' DTPA causes of action or the application of the discovery rule. However, in its judgment, the trial court held that the Wohlfahrts' DTPA counterclaims were time—barred.

Holloway's arguments (in the trial court and on appeal) regarding whether the DTPA counterclaims were time-barred break down into two categories: (1) those based on section 16.069 of the Civil Practice and Remedies Code, which requires counterclaims to be filed within 30 days of the date the answer is due, and (2) those based on the running of the two-year statute of limitations for DTPA claims. TEX. BUS. & COM. CODE ANN. § 17.565; TEX. Civ. Prac. & Rem.Code Ann. § 16.069.[8]

A. Section 16.069

In the prior appeal, the First Court of Appeals addressed Holloway's argument pertaining to section 16.069, holding

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[8] Holloway additionally contends that the Wohlfahrts waived any argument regarding the trial court's time-bar finding by not expressly attacking the trial court's grant of his motion for judgment notwithstanding the verdict either in the trial court or on appeal. Although Holloway may be correct that the Wohlfahrts did not attack the grant of his motion by specifically identifying the motion, he is incorrect in suggesting the Wohlfahrts have not attacked the trial court's action. The Wohlfahrts asserted with specificity both in the trial court and on appeal that the trial court erred in disregarding the jury's DTPA liability findings on the basis that they were time-barred. Accordingly, they have not waived these arguments. *See* TEX R. APP P. 33.1(a), 38.1(h).

that the DTPA counterclaims related back to the first filed counterclaim and thus were not time-barred under that section. Wohlfahrt, 2001 WL 84212, at *4 (citing TEX. CIV. PRAC. & REM.CODE ANN. § 16.068 (Vernon 1997)). Holloway contends that the First Court was "simply wrong" in holding that the counterclaims were not time-barred. However, under the law of the case doctrine, we are bound to follow the prior ruling unless there was a change of issues or facts in the re-trial. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex.1986).[9] Holloway offers no argument regarding changed issues or facts between the first and second trials in regard to the application of section 16.069, and our review of the record reveals no such changes. Thus, the First Court's prior ruling that section 16.069 does not bar the Wohlfahrts' DTPA counterclaims still stands.

B. Statute of Limitations

Also in the prior appeal, after fording section 16.069 did not bar the counterclaims, the First Court considered whether the DTPA statute of limitations barred the claims. TEX. BUS.

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[9] Under the law of the case doctrine, a court considering a subsequent appeal is ordinarily bound by a prior decision in the case. *See Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex.2003). This is true unless there is a substantial change of issues or fact in the retrial. *Hudson*, 711 S.W.2d at 630. The court in Briscoe identified another exception to the doctrine: when the appellate court determines that its first decision was clearly wrong. 102 S.W.3d at 716-17. However, the court's explanation of this exception specifically contemplates that the second appeal is to the same court. *Id.* Although a court can always reconsider its own prior holdings, *see id.*, one intermediate court of appeals is not authorized to overrule the holdings of another intermediate court of appeals. *Long v. State*, 820 S.W.2d 888, 890 (Tex.App.-Houston [1st Dist.] 1991, pet. ref'd); *see also Thomas v. Collins*, 860 S.W.2d 500, 502 (Tex.App.-Houston [1st Dist.] 1993, writ denied) (adopting prior holding by sister court without reanalyzing issue). The proper venue for complaining that a court of appeals ruled erroneously is by motion for rehearing to that court or by petition for review or mandamus to the Texas Supreme Court.

& COM. CODE ANN. § 17.565 (providing two-year limitations period for DTPA claims); *Wohlfahrt*, 2001 WL 84212, at *4. Considering the issue in a pre-trial context, the First Court held that limitations did not bar the claims. *Wohlfahrt*, 2001 WL 84212, at *4. The court based this decision in part on the fact that Holloway had not provided any evidence to show when the Wohlfahrts discovered their cause of action. *See id.* at *3-4. The First Court's opinion, however, did not prevent the parties from offering evidence regarding limitations on remand.

Holloway initially argues that in the live pleadings for the retrial the Wohlfahrts failed to plead the discovery rule as a defense to his limitations pleading. Holloway is simply incorrect. Although, as Holloway points out, the Wohlfahrts did not include the discovery rule in their live answer for the retrial, the Wohlfahrts did plead the discovery rule in their live counterclaim pleading. *See Wohlfahrt*, 2001 WL 84212, at *4 (holding that the Wohlfahrts pleaded the discovery rule). Since Holloway raised his limitations defense in regard to the counterclaims, the most logical place for the Wohlfahrts to raise the discovery rule would have been in their pleadings concerning the counterclaims. They did so; consequently, Holloway's arguments to the contrary are without merit.[10]

In the re-trial, the DTPA counterclaims were submitted as questions to the jury. Holloway contended in the trial court, and contends in the present appeal, that the Wohlfahrts waived their discovery rule defense because they failed to prove and secure jury findings on it, citing *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515 (Tex.1988). However, as the supreme court pointed out in Woods, the burden to prove

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[10] Indeed, there appear to be no significant changes regarding the discovery rule between the live pleadings in the first trial and the live pleadings in the second trial.

and secure findings on the discovery rule arises only once the accrual of a cause of action has been established and limitations has been shown to have run. 769 S.W.2d at 517-18; *see also Tex. Am. Corp. v. Woodbridge Joint Venture*, 809 S.W.2d 299, 303 (Tex.App.-Fort Worth 1991, writ denied); *Wingate v. Acree*, No. 14-01-00851-CV, 2003 WL 1922569, at *2 (Tex.App.-Houston [14th Dist.] April 24, 2003, no pet.) (mem.op.). In other words, "[t]he defendant . . . bears the initial burden to plead, prove, and secure findings to sustain its plea of limitations." *Woods*, 769 S.W.2d at 517.[11] Here, Holloway did not request or obtain a jury finding regarding the accrual of the cause of action or the running of the statute of limitations; he also made no argument in the trial court or in his appellate brief that he had established either issue as a matter of law.[12] Thus, the Wohlfahrts were never required to request an issue or present evidence regarding the discovery rule; the burden of production never shifted to them because Holloway never met his initial burden. *Id.* at 517-18. Accordingly, the Wohlfahrts' alleged failure to offer proof and

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[11] In *Woods*, the defendant met its burden by establishing that the plaintiffs cause of action was barred as a matter of law; however, the plaintiff then failed in his subsequent burden to plead, prove, and secure findings on the discovery rule. 769 S.W.2d at 517-18.

[12] The only argument Holloway made in the trial court was that because the Wohlfahrts' pleadings acknowledged that all legal matters he handled for them were closed by 1992, the counterclaim filed in 1995 was beyond the two-year limitations period. However, the First Court clearly held that the 1995 DTPA counterclaim related back to the original counterclaims filed in 1993; thus, the DTPA counterclaims were not barred by limitations based on the Wohlfahrts' pleadings alone. *Wohlfahrt*, 2001 WL 84212, at *4 (citing *Barraza v. Koliba*, 933 S.W.2d 164, 167-68 (Tex. App.-San Antonio 1996, writ denied) (holding that counterclaim amended to include DTPA claim related back to timely filed counterclaim because it arose from the same transaction)). Because nothing has changed in regard to this issue between the first and second appeals, we are bound by the First Court's prior ruling as the law of the case. *See Briscoe*, 102 S.W.3d at 716; *Hudson*, 711 S.W.2d at 630; supra n. 10.

obtain jury findings regarding the discovery rule is of no consequence.

Because we find that the trial court erred in granting a jnov on the DTPA counterclaims on the basis of the claims being time-barred, we sustain the Wohlfahrts' second issue and reverse and remand for consideration of Holloways additional arguments regarding the counterclaims.

V. Interest

The Wohlfahrts lastly contend that the trial court erred in its calculation of post-judgment interest on the debt award to Holloway. Specifically, on appeal, the Wohlfahrts contend that under changes passed in 2003, section 304.003 of the Texas Finance Code required the trial court to set post-judgment interest at 5%, not the 10% set by the trial court in its judgment. TEX. FIN. CODE ANN. § 304.003 (Vernon Supp.2004). However, in the trial court, the only argument the Wohlfahrts raised regarding post-judgment interest was that under section 304.103, it should have been set at 6%, the same rate that the court used for prejudgment interest in the judgment. *Id.* § 304.103.[13] To have preserved error, a party's argument on appeal must comport with its argument in the trial court. *E.g., Taylor v. Am. Fabritech, Inc.*, 132 S.W.3d 613, 621 & n. 21 (Tex.App.-Houston [14th Dist.] 2004, pet. denied). The Wohlfahrts' objection in the trial court did not apprise the court of the alleged error that the Wohlfahrts now complain about on appeal. *See* TEX.R.APP. P. 33.1. Accordingly, we find that the Wohlfahrts waived their objection to the court's calculation of post-judgment interest by not making it in the trial court. *See Hachar v. Hachar*, 153 S.W.3d 138, 145 (Tex.App.-San Antonio 2004, no pet. h.) (holding that party waived argument regarding post-judgment

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[13] Section 304.103 states in its entirety: "The prejudgment interest rate is equal to the post-judgment interest rate applicable at the time of judgment." TEX FIN.CODE ANN. § 304.103.

interest rate by not making it in the trial court); *El Paso Dev. Co. v. Berryman*, 769 S.W.2d 584, 592 (Tex.App.-Corpus Christi 1989, writ denied) (holding that party waived argument regarding compounding of post-judgment interest by not making it in the trial court). The Wohlfahrts' third issue is overruled.

VI. Holloway's Appeal: Taxation of Costs

We turn now to Holloway's appeal pertaining to taxation of costs in the earlier appeal to the First Court of Appeals. As mentioned, Holloway won in the first trial in this case, but the First Court reversed that judgment and assessed costs against Holloway. Of the four court reporters who prepared portions of the record for the appeal, only two filed cost certificates; thus, the First Court's mandate indicated that the costs for the other two reporters was "unknown." The First Court then ordered the trial court to determine and assess the costs for those two reporters.[14] The trial court heard evidence regarding costs in two hearings. The trial court then ordered that the First Court's mandate be reformed to include as costs the amounts claimed by the remaining two reporters.

In his appeal, Holloway primarily contends that upon receiving the mandate the trial court should have determined and assessed the *reasonable and necessary* costs and not simply the *actual* costs assessed by the reporters and paid by the Wohlfahrts. Holloway argues both that the court reporter's fees are unreasonable and that portions of the record brought on appeal were not necessary for the appeal. In response, the Wohlfahrts filed a motion to dismiss and an appellees' brief asserting, respectively, that the Fourteenth Court of Appeals does not have jurisdiction over the taxation

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[14] The First Court specifically ordered the trial court "to hold a hearing to determine the costs of the items designated as 'Unknown' [in the First Court's mandate] and to then assess costs as set forth in the judgment and mandate of this Court."

issues from the first appeal and that the trial court was not authorized to consider the reasonableness and necessity of the costs. We agree with the former contention and hold that we are without jurisdiction to consider Holloway's appeal.

We begin by noting that this area of law is somewhat murky. The Texas Supreme Court has held that a request to "retax" costs must be made in the court in which the costs were incurred. *E.g., Reaugh v. McCollom Exploration Co.*, 167 S.W.2d 727, 727-28, 140 Tex. 322, 324-25 (1943) (dismissing complaint regarding taxation of costs for want of jurisdiction); *Southland Life Ins. Co. v. Statler*, 170 S.W.2d 714, 715, 141 Tex. 110, 112 (1943) (orig. proceeding); *see also Pitts v. Dallas County Bail Bond Bd.*, 23 S.W.3d 407, 417 (Tex.App.-Amarillo 2000, pet. denied) ("Correction of errors in specific items of costs is sought by a motion to retax costs."); *Lopez v. Cent. Plains Reg'l Hosp.*, 859 S.W.2d 600, 607 (Tex.App.Amarillo 1993, no writ) (considering taxation of costs issue raised as cross-point). The supreme court further held that the cost of a reporter's record for use in perfecting an appeal to a court of appeals is cost accruing in that court of appeals. *E.g., Reaugh*, 167 S.W.2d at 727, 140 Tex. at 324; *Southland Life Ins.*, 170 S.W.2d at 715, 141 Tex. at 112.

However, in *City of Ingleside v. Stewart*, 5S4 S.W.2d 939, 948 (Tex.App.-Corpus Christi 1977, writ ref'd n.r.e.), the Corpus Christi Court of Appeals suggested that statutory changes have rendered the holdings in *Reaugh* and *Southland Life* no longer valid. Specifically, the Corpus Christi Court held that, because section 52.047 of the Government Code (formerly article 2324 of the Texas Revised Civil Statutes) states that a district court is to determine the reasonableness of a reporter's fee when objected to, a motion to retax is no longer permissible in a court of appeals. TEX. GOV'T CODE ANN. § 52.047 (Vernon 1998); *Stewart*, 554 S.W.2d at 948. Even if the Corpus Christi Court is correct in regard to the

reasonableness of the fee charged, a matter we need not decide at this juncture, the court of appeals still appears to be the correct venue for arguments regarding the necessity of portions of the appellate record. *See Lopez*, 859 S.W.2d at 607 (addressing cost issue raised in cross-point); *Planet Plows, Inc. v. Evans*, 600 S.W.2d 874, 877 (Tex.Civ.App.-Amarillo 1980, no writ) (addressing cost issue raised in motion for rehearing and motion to retax costs); *Perkins Constr. Co. v. Ten-Fifteen Corp.*, 545 S.W.2d 494, 501-02 (Tex.Civ.App.-San Antonio 1976, no writ) (addressing cost issue raised by appellant).

Notwithstanding the unsettled nature of this area of law, the proceedings about which Holloway complains were part and parcel of the first appeal in this case; they played no role in the second trial or in the second appeal brought by the Wohlfahrts. Holloway's appeal is not from a motion to retax costs filed in the trial court. *See Holloway v. Butler*, 828 S.W.2d 810, 811 (Tex.App.-Houston [1st Dist.] 1992, writ denied) (considering appeal from district court's denial of motion to retax); *see also Price v. State*, 856 S.W.2d 226, 227 (Tex.App.-Fort Worth 1993, writ ref d) (noting that appeal was from judgment and not from the overruling of the motion to retax). The record does not reflect that any such motion was filed in the trial court. The trial court held hearings and made its rulings strictly pursuant to the First Court's specific directive regarding costs. The trial court then assessed costs pursuant to the First Court's order. If Holloway wished to assert error in the First Court's order, he could have filed a motion for rehearing in the First Court or a petition for review or for writ of mandamus in the Texas Supreme Court. *See* TEX.R.APP. P. 49.1 (permitting motions for rehearing in courts of appeals); 52.1-52.11 (governing original proceedings in Texas Supreme Court); 53.1-56.5 (governing petitions for review to the Texas Supreme Court). Holloway cites no authority, and we are aware of none, that permits a wholly new appeal to be taken from such a procedure (whether the

appeal is assigned to the First Court or the Fourteenth). Accordingly, we grant the Wohlfahrts' motion and dismiss Holloway's appeal for want of jurisdiction.[15]

VII. Conclusion

Based on the foregoing, we reverse and render the portions of the trial court's judgments awarding Holloway recovery on his quantum meruit cause of action, we reverse and remand the portions holding that the Wohlfahrts' DTPA causes of action were time-barred, and we affirm the portions awarding Holloway recovery on his debt claims. We dismiss Holloway's appeal regarding the taxation of appellate costs for want of jurisdiction.

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[15] The Wohlfahrts filed a motion to strike certain items from the appendix attached to Holloway's reply brief. This motion was also taken with the case. Because we hold that we do not have jurisdiction to consider Holloway's appeal, we overrule this motion as moot.

APPENDIX B

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
129TH JUDICIAL DISTRICT

CAUSES NUMBER 92.010256

JOHN H. HOLLOWAY,

Plaintiff,

versus

DOUGLAS WOHLFAHRT, M.D. and LYNN WOHLFAHRT,

Defendants.

FINAL JUDGMENT

BE IT REMEMBERED that on the 2nd day of June, 2003, came on the parties in the above numbered and styled cause, and announced "ready" for trial. This cause had previously been consolidated for purposes of trial with Causes Number 92.0102589 and 92.010590. A Final Judgment in consolidated Causes Number 92.010589 and 92.010590, previously signed in a separate document, is also amended but in a separate revised Final Judgment. A jury of 12 citizens of Harris County, good and true, were duly selected, sworn and seated, and evidence presented. After all evidence had been received, the court prepared and read the court's charge to the jury. Upon the completion of the attorneys' summations the jury retired to deliberate. On June 13, 2003 the jury returned its answers to the questions in the court's charge, ten members agreeing to all answers given. After the jury was polled and the court received the verdict, the jury was discharged. Based upon the answered jury questions, the court granted an signed a Final Judgment herein on June 26, 2003. The court now supplants that judgment, includes pre-

judgment interest on Plaintiff's *quantum meruit* recovery, and disregards the jury's answers on Defendants' time-barred counterclaims. It is therefore accordingly:

ORDERED, ADJUDGED, AND DECREED that Plaintiff, John H. Holloway, shall have and is hereby granted judgment on his claims for the value of his attorney fees in the principal sum of $99,776.00, together with pre judgment interest at the rate of 10% per annum, simple, in the amount of $157,769.09 against Co-Defendants, Douglas Wohlfahrt, M.D. and Lynn Wohlfahrt, jointly and severally, which total sum of $257,545.09 shall bear interest at the rate of 10% per annum from this date until paid in full. It is further:

ORDERED, ADJUDGED, AND DECREED that Defendants, Douglas Wohlfahrt, M.D. and Lynn Wohlfahrt shall TAKE NOTHING on their time-barred counterclaims against Plaintiff, John H. Holloway.

All costs in this cause are charged to Douglas Wohlfahrt, M.D. and Lynn Wohlfahrt. All relief as to Cause Number 92.010256, not granted herein, is denied. This is a final judgment as is contemplated in *Lehmann v. Har-Con Construction Co.*, and subject to timely appeal.

Signed this the 24th day of September, 2003.

/s/ P. K. Reiter
P.K. REITER, Judge Presiding

APPENDIX C

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
129TH JUDICIAL DISTRICT

[Filed JUN 16 2003]

Cause No. 92-10256

JOHN H. HOLLOWAY,

Plaintiff,

v.

DOUGLAS WOHLFAHRT, M.D. and LYNN WOHLFAHRT,

Defendants.

JURY CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of laws, you must be governed by the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations you will

not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury mis-

conduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." "Preponderance of the evidence" means the greater weight and degree of credible evidence admitted in this case. Whenever a question requires an answer other than "Yes" or "no," your answer must be based on a preponderance of the evidence.

Circumstantial Evidence. You are instructed that a fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proven.

Preponderance of the Evidence. Preponderance of the evidence means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this trial.

QUESTION NO. ONE

Do you find that John H. Holloway entered into an oral contract with Douglas Wohlfahrt or Lynn Wohlfahrt to

"barter" his legal services in various legal matters for the Wohlfahrts in exchange for the expert medical opinions of Douglas Wohlfahrt relating to medical malpractice claims or suits being handled by John H. Holloway?

Answer "Yes" or "No."

ANSWER: No

If you have answered Question No. ONE "Yes," then answer Question No. ONE "A"; otherwise do not answer Question No. ONE "A"

QUESTION NO. ONE "A"

Which of the following legal matters listed below do you find that said bartering agreement applied?

Answer by "circling" the number of the legal matter involved.

(1) OB Association
(2) Sandra Garman
(3) Russell Rowe
(4) Gilpin-Maynard
(5) Melina Buchanan
(6) Texas Com. Bank
(7) Century-21 eviction
(8) Miller Wallcovering
(9) National car lease
(10) Traffic ticket
(11) Citizens Bank
(12) School; criminal
(13) Citi-Corp
(14) 1st Bank Bellaire
(15) Office lease
(16) Hot checks (Lynn)
(17) Coastal Medical
(18) All-Quip
(19) Cuthrell-Hough
(20) National Health
(21) Sarmiento lease
(22) Smith-Klein Lab
(23) Melva Stargill
(24) Southwest Telephone
(25) Damon Clin. Lab.
(26) American Express

(27) Quail Grove house
(28) Conrad legal malp.
(29) Baylor student loan
(30) Yovanovic CPA fees
(31) Landmark Chev.
(32) Tracy Uhl-Chris
(33) John's Pool
(34) First City Bank
(35) Smith Academy
(36) Thompson Med.Mal.
(37) Hanks/Stewart Title
(38) Alief Bank
(39) Mielke Malp.
(40) Roche Bio-Med
(41) Sheinfeld, Maley
(42) General Medical
(43) C.S.I van repair
(44) Schneider

If you have answered Question No. ONE "No," then answer Question No. TWO.

QUESTION NO. TWO

Did the Wohlfahrts and John Holloway agree to enter, into an attorney-client relationship whereby the Wohlfahrts were to pay John Holloway for his reasonable and necessary legal services?

Answer "Yes" or "No":

ANSWER: No

QUESTION NO. TWO "A"

What do you find to be a reasonable attorney's fee for the necessary services rendered by John H. Holloway in handling each of the following legal matters, stated in dollars and cents?

	Legal matter	ANSWER:
1.	O. B. ASSOCIATION	$900.00
2.	SANDRA. GARMAN	$750.00
3.	RUSSELL ROWE	$1600.00

4.	GILPIN-MAYNARD	$7,500.00
5.	MELINA BUCHANAN	$375.00
6.	TEXAS COMMERCE BANK	$1,443.00
7.	CENTURY-21 EVICTION	$875.00
8.	MILLAR. WALLCOVERING EXECUTION	$700.00
9.	NATIONAL CAR LEASE	$250.00
10.	TRAFFIC TICKET (LYNN)	$200.00
11.	CITIZENS BANK	$3,500.00
12.	SCHOOL CRIMINAL CHARGE	$1,200.00
13.	CITI-CORP CAR LOAN	$1,800.00
14.	FIRST BANK OF BELLAIRE, NOTE	$1,000.00
15.	OFFICE LEASE	$350.00
16.	HOT CHECKS (LYNN)	$4,000.00
17.	COASTAL MEDICAL	$150.00
18.	ALL-QUIP RENTAL	$50.00
19.	CUTHRELL-HOUGH ATTY. FEE JUDG.	$3,500.00
20.	NATIONAL HEALTH LABS	$625.00
21.	HOUSE LEASE (SARMIENTO)	$625.00
22.	SMITH KLEIN LAB	$1,250.00
23.	MELVA STARGHILL	$1,500.00
24.	SOUTHWEST BELL TELEPHONE	$200.00
25.	DAMON CLINICAL LAB	$700.00
26.	AMERICAN EXPRESS	$1,000.00
27.	QUAIL GROVE HOUSE PURCHASE	$1,500.00
28.	CONRAD, MALPRACTICE JUDGMENT	$2,500.00

29.	BAYLOR COLLEGE STUDENT LOAN	$1,500.00
30.	YOVANOVIC, CPA SERVICES	$1,875.00
31.	LANDMARK CHEV. VEHICLE	$500.00
32.	TRACY UHL/CERIS DISPUTE	$750.00
33.	JOHN'S POOL, SERVICE	$350.00
34.	FIRST CITY BANK	$350.00
35.	SMITH ACADEMY (CHRIS WOHLFAHRT)	$500.00
36.	THOMPSON MED. MALPRACTICE CLAIM	$150.00
37.	HANKS/STEWART TITLE DISPUTE	$1,500.00
38.	ALIEF BANK (ACCT. CLOSURE)	$3,000.00
39.	MIELKE MALPRACTICE SUIT	$6,525.00
40.	SHEINFIELD-MALEY FEE CLAIM	$2,750.00
41.	ROCHE BIO-MED	$1,000.00
42.	GENERAL MEDICAL CLAIM	$700.00
43.	C.S.I. VAN REPAIR	$2,000.00
44.	SCHNEIDER BANKRUPTCY AND STATE COURT PROCEEDINGS	$63,750.00

In determining what is a "reasonable attorney's fee" for legal services and time expended by an attorney for the use and benefit of a client in legal matters, you are instructed that you should consider the following facts or factors in deciding the "reasonableness" of the amount of attorney's fees to be awarded:

a. The time and labor involved, the novelty and difficulty of the legal questions involved, and the skill required to perform the legal services properly;

b. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

c. The fee customarily charged for similar legal services;

d. The amount involved and the results obtained;

e. The time limitations imposed by the client or the circumstances;

f. The nature and length of the professional relationship with the client;

g. The experience, reputation, and ability of the lawyer performing the legal services;

h. Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

QUESTION NO. TWO "B"

If your answer to Question No. TWO is "Yes," then answer the following question. Otherwise, do not answer the following question:

Did the Wohlfahrts breach this agreement with John Holloway?

Answer "Yes" or "No": -

ANSWER: _____

QUESTION NO. THREE

What do you find to be the "reasonable value" of any expert medical opinions or medical review by Douglas Wohlfahrt of medical malpractice cases, if any, being handled by John H. Holloway?

Answer by stating the amount, if any, in dollars and cents.

ANSWER: $14,000.00

QUESTION NO. FOUR

Do you find that John H. Holloway loaned Douglas and Lynn Wohlfahrt, or advanced for the benefit of Douglas Wohlfahrt or Lynn Wohlfahrt, the following sums of money while handling legal matters for the defendants?

Answer "Yes" or "No" as to each subpart:

(a) $4,000.00 on August 28, 1985, for attorney's fees and costs in a suit in Denver, Colorado, being handled by Attorney James. Rowe for the Wohlfahrts?

ANSWER: Yes

(b) $1,622.22 on June 8, 1987, in payment of an execution on a judgment held by Millar Wallcovering Co.?

ANSWER: Yes

(c) $3,000.00 on May 6, 1987, in settlement of the balance of a default judgment held by Texas Commerce Bank in Austin against Douglas Wohlfahrt?

ANSWER: Yes

If you have answered "Yes" to any of the items (a) through (c) in Question No. FOUR, then answer the following question:

QUESTION NO. FIVE

What do you find to be the dates and amounts, if any, of any repayments of such loans or advances?

Answer each subpart as the amount of repayment and date:

(a) $4,000.00 on August 28, 1985, for attorney's fees and costs in a suit being handled by Attorney James Rowe?

ANSWER: Amount paid: (1) $500.00, (2) $2,000.00

Date of payment: (1) 1-13-88, (2) 4-26-89

(b) $1,622.22 on June 8, 1987, in payment of an execution on a judgment held by Millar Wallcovering Co.?

ANSWER: Amount paid: -0-

Date of payment: N/A

(c) $3,000.00 on May 6, 1987, in settlement of the balance of a judgment held by Texas Commerce Bank in Austin?

ANSWER: Amount paid: -0-

Date of payment: N/A

QUESTION NO. SIX

Did John Holloway loan or advance to Lynn Wohlfahrt the sum of $10,000.00 on November 22, 1991, based upon Lynn Wohlfahrt's execution of certificates of titles on two automobiles as security for repayment of the $10,000.00?

Answer "Yes" or "No."

ANSWER: Yes

If you have answered Question No. SIX "Yes," then answer the following question:

QUESTION NO. SIX "A"

Do you find that Lynn Wohlfahrt or Douglas Wohlfahrt have repaid John H. Holloway the $10,000.00 loan?

Answer "Yes" or "No."

ANSWER: No

QUESTION NO. SEVEN

Do you find that John Holloway made a negligent misrepresentation concerning his handling of legal matters for the Wohlfahrts and that the Wohlfahrts justifiedly relied

thereon and suffered any damages as a proximate cause of such representations, if any.

You are instructed that a negligent misrepresentation occurs when an attorney is handling legal matters for a client only under the proof of the following facts:

(1) that the attorney has made a representation in the course of his business or in a transaction in which he has a pecuniary interest;

(2) the representation supplied false information for the guidance of the clients in relation to the handling of the legal matters in question; and

(3) the attorney in making the representation did not exercise reasonable care or competence in obtaining or communicating the information to the client.

You are further instructed that if an attorney makes a reasonable decision in the handling of a legal matter for a client, that such decision does not involve a negligent misrepresentation simply because the decision later proves to be imperfect.

ANSWER "YES" OR "NO."

ANSWER: No

If you have answered Question No. SEVEN "Yes," and only in that event, then answer the following question.

QUESTION NO. SEVEN "A"

Do you find that the Wohlfarts suffered any damages as a proximate cause of any negligent misrepresentation made by John Holloway in handling the various legal matters for them?

ANSWER "YES" OR "NO."

ANSWER: _____

If you have answered Question No. SEVEN "A" "Yes," and only in that event, then answer the following question.

QUESTION NO. SEVEN "B"

What sum of money do you find would be fair and reasonable as damages for such negligent misrepresentations, if any?

ANSWER BY STATING THE AMOUNT, IF ANY, IN DOLLARS AND CENTS.

ANSWER: $_____

You are instructed that in answering Question No. SEVEN "B" that economic damages for negligent misrepresentation are limited to those necessary to compensate the client for the pecuniary loss caused by the misrepresentation. Benefit of the bargain and lost-profit damages are not available and cannot be awarded. You may not consider any physical harm as an element of damages.

QUESTION NO. 8

Did John Holloway slander or defame the Wohlfahrts?

Instructions

The Wohlfarts in a defamation case must establish five elements: (1) Holloway published a factual statement; (2) that was defamatory; (3) and concerned the Wohlfarts (4) while acting with negligence, regarding the truth of the statement, (5) and the factual statement was false.

A statement is slanderous or defamatory if it tends to injure the person's reputation and thereby exposes the person to public hatred, contempt or ridicule, or financial injury or to impeach that person's honesty, integrity, or virtue.

Answer "Yes" or "No":

ANSWER: No

QUESTION NO. 8 "A"

If your answer to Question No. 8 is "Yes," then answer the following question.

Otherwise, do not answer the following question.

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the Wohlfahrts for their damages, if any, that resulted from such slanderous or defamatory statement?

Instructions

Consider the following elements of damages, if any, and none other.

Injuries to the Wohlfahrts' reputation or character.

Mental anguish sustained by Doug Wohlfahrt in the past.

Mental anguish sustained by Lynn Wohlfahrt in the past.

Mental anguish that, in reasonable probability, Doug Wohlfahrt will sustain in the future. Mental anguish that, in reasonable probability, Lynn Wohlfahrt will sustain in the future.

All pecuniary loss, if any, resulting from John Holloway's slanderous or defamatory statement.

Answer in dollars and cents for damages, if any.

ANSWER: $_____

If your answer to Question No. 8 was "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 8 "B"

Do you find by clear and convincing evidence that John Holloway acted with actual malice in slandering or defaming the Wohlfahrts?

Actual malice as so defined requires a finding that the alleged utterance was made with knowledge of its falsity or with reckless disregard as to whether it was true or false.

Clear and convincing means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

ANSWER: _____

QUESTION NO. 8 "C"

If your answer to Question No. 8 "B" is "Yes," then answer the following question. Otherwise, do not answer the following question.

What sum of money, if any, if. paid now in cash, should be assessed against John Holloway as exemplary damages for the defamatory statements made by John Holloway?

Instructions

"Exemplary damages" means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Consider the following elements of damages, if any, and none other.

a. The nature of the wrong.

b. The character of the conduct involved.

c. The degree of culpability of the wrongdoer.

d. The situation and sensibilities of the parties concerned.

e. The extent to which such conduct offends a public sense of justice and propriety.

Answer in dollars and cents for damages, if any.

ANSWER: _____

QUESTION NO. 9

If your answer to Question No. TWO is "Yes," then answer the following question. Otherwise, do not answer the following question.

By what date should John Holloway, in the exercise of reasonable diligence, have discovered that the Wohlfahrts owed John Holloway for the legal services provided?

Instructions

Answer for each legal matter.

1.	OB Asociation Matter	ANSWER: _____
2.	Sandra Garman Matter	ANSWER: _____
3.	Russel Rowe Matter	ANSWER: _____
4.	Gilpin-Maynard Matter	ANSWER: _____
5.	Melinda Buchanan Matter	ANSWER: _____
6.	Texas Comm. Bank Matter	ANSWER: _____
7.	Century 21 Matter	ANSWER: _____
8.	Miller Wallcovering Matter	ANSWER: _____
9.	National Car Rental Matter	ANSWER: _____
10.	Traffic Ticket Matter	ANSWER: _____
11.	Citizens Bank Matter	ANSWER: _____
12.	Truancy matter	ANSWER: _____
13.	Citi Corp. Matter	ANSWER: _____
14.	First Bank Bell Matter	ANSWER: _____
15.	Office Lease Matter	ANSWER: _____
16.	Hot Check Matter	ANSWER: _____
17.	Coastal Medical Matter	ANSWER: _____
18.	All-Quip. Med. Matter	ANSWER: _____

19. Cuthrell-Hough Matter ANSWER: _____
20. National Health Matter ANSWER: _____
21. Sarmiento Lease Matter ANSWER: _____
22. Smith Klein Lab Matter ANSWER: _____
23. Melva Stargill Matter ANSWER: _____
24. Southwest Telephone Matter ANSWER: _____
25. Damon Clinic Lab Matter ANSWER: _____
26. American Express Matter ANSWER: _____
27. Quail Grove Matter ANSWER: _____
28. Conrad Malpractice Matter ANSWER: _____
29. Baylor Loan ANSWER: _____
30. Yovanovic Matter ANSWER: _____
31. Landmark Chevrolet ANSWER: _____
32. Tracy Uhl/Chris Wohlfahrt Matter ANSWER: _____
33. John's Pool Matter ANSWER: _____
34. First City Bank Matter ANSWER: _____
35. Smith Academy Matter ANSWER: _____
36. Thompson Malpractice Matter ANSWER: _____
37. Hanks/Stewart Matter ANSWER: _____
38. Alief Bank Matter ANSWER: _____
39. Mielke Matter ANSWER: _____
40. Sheinfield, Maley Matter ANSWER: _____
41. Roche Bio-Med. Matter ANSWER: _____
42. General Medical Matter ANSWER: _____
43. CSI Van Repair ANSWER: _____
44. Schneider Matter ANSWER: _____

QUESTION NO. 10

Did the Wohlfahrts and John Holloway enter into an agreement whereby John Holloway would pay the Wohlfahrts for the medical services of Dr. Wohlfahrt.

Answer "Yes" or "No":

ANSWER: No

QUESTION NO. 10 "A"

If your answer to Question No. 10 is "Yes" then answer the following question. Otherwise, do not answer the following question.

Did John Holloway breach his agreement with the Wohlfahrts whereby John Holloway would pay the Wohlfahrts for Dr. Wohlfahrts' medical services?

Answer "Yes" or "No":

ANSWER: _____

QUESTION NO. 10 "B"

Did the Wohlfahrts perform compensable work for John Holloway?

Instructions

One party performs compensable work if valuable services are rendered or materials furnished for another party who knowingly accepts and uses them and if the party accepting them should know that the performing party expects to be paid for the work.

Answer "Yes" or "No"

ANSWER: No

QUESTION NO. 10 "C"

What is the reasonable value of such compensable work at the time and place it was performed?

Instructions

Consider the following elements of damages, if any, and none other.

The value of Dr. Wohlfahrts' services in the medical field as derived from testimony in this case.

Do not include any amounts for services performed on matters that you found were subject to the bartering agreement, if any.

All reasonable and necessary fees for Dr. Wohlfahrt's services. Answer in dollars and cents for damages, if any.

ANSWER: $200.00

QUESTION NO. 11

Did John Holloway commit fraud against the Wohlfahrts?

Instructions

Fraud occurs when

a. a party makes a material misrepresentation

b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,

c. the misrepresentation is made with the intention that it should be acted on by the other party, and

d. the other party acts in reliance on the misrepresentation and thereby suffers injury.

Answer "Yes" or "No":

ANSWER: No

QUESTION NO. 11 "A"

If your answer to Question No. 11 is "Yes," then answer the following question. Otherwise, do not answer the following question.

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the Wohlfahrts for their damages, if any, that resulted from such fraud?

Instructions

Consider the following elements of damages, if any, and none other.

The difference, if any, in the value of the services actually charged by Holloway and the amounts he represented it would cost the Wohlfahrts to handle legal matters.

The pecuniary loss, if any, suffered as a consequence of the Wohlfahrts' reliance on the misrepresentation.

The reasonable and necessary expenses incurred by the Wohlfahrts as a result of the fraud. Mental anguish sustained by Doug Wohlfahrt in the past.

Mental anguish sustained by Lynn Wohlfahrt in the past.

Mental anguish that, in reasonable probability, Doug Wohlfahrt will sustain in the future. Mental anguish that, in reasonable probability, Lynn Wohlfahrt will sustain in the future. Answer in dollars and cents for damages, if any.

ANSWER: $_____

QUESTION NO. 12

If your answer to Question No. 11 is "Yes," then answer the following question. Otherwise, do not answer the following question:

Do you find by clear and convincing evidence that John Holloway committed fraud?

Answer "Yes" or "No".

Clear and convincing means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

ANSWER: _____

If your answer to Question No. 12 is "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 12 "A"

What sum of money, if any, if paid now in cash, should be assessed against John Holloway as exemplary damages for the fraud committed against the Wohlfahrts?

Instructions

"Exemplary damages" means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Consider the following elements of damages, if any, and none other.

a. The nature of the wrong.

b. The character of the conduct involved.

c. The degree of culpability of the wrongdoer.

d. The situation and sensibilities of the parties concerned.

e. The extent to which such conduct offends a public sense of justice and propriety.

Answer in dollars and cents for damages, if any.

ANSWER: _____

QUESTION NO. 13

Did John Holloway engage in any false, misleading, or deceptive act or practice that was a producing cause of damages to the Wohlfahrts?

Instructions

"Producing cause" means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

"False, misleading, or deceptive act or practice" means any of the following:

(1) John Holloway represented that his services were of a particular standard, quality, or grade, when they were of another;

(2) John Holloway represented that an agreement confers or involves rights that it did not have or involve;

(3) John Holloway represented that work had been performed when the work was not performed;

(4) John Holloway failed to disclose information concerning his services which was known at the time of the transaction where such failure to disclose was intended to induce the Wohlfahrts into a transaction into which they would not have entered had the information been disclosed;

Answer "Yes" or "No":

ANSWER: Yes

QUESTION NO. 13 "A"

Did John Holloway engage in any unconscionable action or course of action that was a producing cause of damages to the Wohlfahrts?

Instructions

"Producing cause" means an efficient, exciting or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

An unconscionable action or course of action is an act or practice that, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

Answer "Yes" or "No":

ANSWER: Yes

QUESTION NO. 13 "B"

If your answer to Question No. 13 or 13 "A" is "Yes," then answer the following question. Otherwise, do not answer the following question.

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the Wohlfahrts for their damages, if any, that resulted from such false, misleading, or deceptive act or practice?

Instructions

Consider the following elements of damages, if any, and none other.

The difference, if any, in the value of the services actually charged by Holloway and the amounts he represented it would cost the Wohlfahrts to handle legal matters.

The pecuniary loss, if any, suffered as a consequence of the Wohlfahrts' reliance on the false, misleading, or deceptive acts.

The reasonable and necessary expenses incurred by the Wohlfahrts as a result of Holloway's false, misleading, or deceptive acts.

Answer in dollars and cents for damages, if any.

ANSWER: $4,469.00

QUESTION NO. 13 "C"

If your answer to Question No. 13 or 13"A" is "Yes," then answer the following question. Otherwise, do not answer the following question.

Was John Holloway's unconscionable action or false, misleading, or deceptive act or practice committed knowingly or intentionally?

Knowingly means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim.

Answer "Yes" or "No":

ANSWER: Yes

If your answer to Question No. 13 "C" is "Yes" then answer the following question, otherwise do not answer the following question.

QUESTION NO. 13 "D"

What sum of money, if any, would fairly compensate the Wohlfahrts for the mental anguish they sustained, and in reasonable probability would sustain in the future, as a result of the conduct you found Holloway to have committed in response to Question No. 13 "C"

Answer in dollars and cents for damages, if any.

ANSWER: $100.00

QUESTION NO. 14

What is a reasonable fee for the necessary services of the Wohlfahrts' attorneys in this case?

Answer in U.S. dollars and cents with an amount:

ANSWER:

Preparation and trial	$50,000.00
For an appeal to the Court of Appeals	$25,000.00
For making or responding to a Petition for Review to the Supreme Court of Texas	$15,000.00
If petition for review is granted by the Supreme Court of Texas	$10,000.00

After you retire to the jury room, you will select your own presiding juror. The first thing •the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror:

1. to preside during your deliberations,.
2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,
3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,
4. to vote on the questions,
5. to write your answers to the questions in the spaces provided, and
6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge, and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

/s/ [Illegible]
Judge Presiding

Certificate

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same to the court as our verdict.

(To be signed by the presiding juror if unanimous.)

_____

PRESIDING JUROR

(To be signed by the presiding juror if unanimous.)

APPENDIX D

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
129TH JUDICIAL DISTRICT

[Filed Jan. 28, 2002]

No. 92-010256
(Consolidated Nos. 92-01056, 92-010589, and 92-10590)

JOHN H. HOLLOWAY,
Plaintiff,

vs.

DOUGLAS WOHLFAHRT, M.D. and LYNN WOHLFAHRT,
Defendants.

PLAINTIFF'S SIXTH AMENDED PETITION
AND ANSWER TO WOHLFAHRTS'
FIRST AMENDED COUNTERCLAIM

TO THE SAID HONORABLE COURT:

JOHN H. HOLLOWAY, Plaintiff, a resident of Harris County, Texas, brings this suit against DOUGLAS WOHLFAHRT and LYNN WOHLFAHRT, jointly and severally, who are residents of Harris County, Texas, and files his Sixth Amended Petition and Answer to Defendants' Counterclaim. Plaintiff demands a jury trial as to all controverted issues of liability and damages. Plaintiff would show the Court and jury the following facts which support Plaintiff's cause of action for damages against the defendants jointly and severally.

I.

PARTIES AND BASIS OF PLAINTIFF'S SUIT

The defendants are husband and wife. They jointly and severally employed the Plaintiff to perform legal services in connection with various lawsuits and personal matters. The defendants orally contracted to pay Plaintiff reasonable attorney's fees based upon $250.00 an hour for his services rendered for their joint and several benefit and to reimburse Plaintiff for expenses advanced in his representation of defendants.

Defendants failed to timely file the counterclaim or cross-claim within 4 years from the date of the accrual of each of such alleged fees. Limitations is established, as a matter of law, as to all fees for alleged services rendered more than four years prior to May 2, 1995, the date of filing of defendants' counterclaim.

XXV.

DEFENDANTS' TORT CLAIMS ARE BARRED BY LIMITATIONS

Without waiving such denials, Plaintiff alleges and asserts that the fraud, slander and breach of fiduciary duty, negligence, misrepresentations, overreaching and other tort and contract claims asserted in Paragraphs 13, 14, 15, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, and 61, and in all other paragraphs which may infer tort or negligence or breach of duty by Plaintiff as contained in Defendants' First Amended Counterclaim filed on or about May 2, 1995, are barred by the two-year statute of limitations.

Alternatively, the tort claims are unrelated to Plaintiff's suit to recover reasonable attorney's fees and loans. Malicious prosecution is not a proper counterclaim which can be

asserted against Plaintiff's contract claims for attorney's fees or loans since a malicious prosecution claim could exist only after the defendants have won a prior suit. It cannot be legally maintained in a pending suit against the Plaintiff.

The alleged fraud and violations of fiduciary duties are barred by Sec. 16.001, Civil Practices & Remedies Code, a Four-Year Statute of Limitations, because suit was not timely filed within four years from the date of accrual of such alleged causes of action. The Plaintiff denies such alleged causes of action.

The alleged tort claims and deceptive trade practices claims are barred by Sec. 16.003(a), Civil Practices & Remedies Code, a Two-Year Statute of Limitations, because suit was not timely filed within two years after the accrual of such causes of action. The Plaintiff denies such alleged causes of action.

The alleged malicious prosecution and slander claims are barred by Sec. 16.003(a), Civil Practices & Remedies Code, a One-Year State of Limitations, because suit was not timely filed within one year after the accrual of such causes of action. The Plaintiff denies such alleged causes of action. The claim for slander is not a proper counterclaim against contract claims asserted by Plaintiff. The malicious prosecution claim is not a proper counterclaim against Plaintiff's contract claims and, in fact, a malicious prosecution claim is permissible only after a defendant has prevailed in a prior suit.

The alleged counterclaims are independent, separate and unrelated to Plaintiff's attorney's fees suit and suit to recover for loans made to the defendants, and are not proper and legal counterclaims to the Plaintiff's causes of action based upon contract.

Defendants' counterclaim based upon assertion of Deceptive Trade Practices is barred by reason of defendants' failure to comply with the provisions of the Code mandating notice

of the claim and timely filing of the claim thereafter. Defendants' pleadings are legally insufficient to establish a present right of the defendants' to assert a claim for damages under the statutes relating to deceptive trade practices.

XXVI.

COUNTERCLAIMS ARE BARRED BY SEC. 16.069 OF CODE

Each and all of the alleged counterclaims or cross-claims of defendants are, alternatively, barred by limitations due to the failure of the defendants to timely file a counterclaim or cross-action within 30 days from the date their answers were due in the three suits, as required by Sec. 16.069, Civil Practices & Remedies Code. Defendants' (Counter-Plaintiffs) First Amended Counter-Claim was not filed until on or about May 2, 1995, in Cause No. 92-010256 as consolidated, and as reflected by the following dates as to which answers were due in the three suits, and the legal requirement to file any counterclaims within 30 days thereafter.

Cause No. 92-010256 (attorney's fee suit) was filed March 6, 1992. Defendants' answer was filed on or about April 1, 1992. Defendants' Original Counterclaim was not filed until on or about May 2, 1995, and it asserted only a "bartering" defense to Plaintiff's suit for attorney's fees. It is not a valid counterclaim seeking affirmative relief or damages. The pleading is purely defensive to avoid the claim for attorney's fees.

Cause No. 92-010589 ($8,622.22 loan suit) was filed March 9, 1992. Defendants' answer was filed on or about March 28, 1992. The defendants' First Amended Counterclaim was not filed until on or about May 2, 1995. The untimely filed counterclaim asserting various torts and improper representation by Plaintiff of various legal and personal matters of the defendant is not a valid counterclaim against the undisputed loans by Plaintiff to the defendants.

Cause No. 92-010590 The $10,000 loan suit was filed March 9, 1992. Defendants' answer was filed on or about March 28, 1992. Defendants' First Amended Counterclaim was not filed until on or about May 2, 1995. Based upon the undisputed evidence surrounding the $10,000 loan, the defendants allegations that the loan was not secured by two automobiles and that the loan was merely a "refund of a retainer fee on the Mielke case" is false and misleading, and have been waived by their failure to raise no evidence or great weight points in the trial court or on appeal. The appellate court lacked jurisdiction to reverse the unattacked jury verdict and remand of such issues for a new trial.

Alternative to Plaintiff's plea of limitations, Plaintiff alleges that any claim for fees for expert medical review or for alleged medical services rendered to Plaintiff's family are barred by laches, by a failure of consideration, and by lack of any legal obligation for Plaintiff to pay for his daughter's medical care in absence of a written agreement to do so.

Plaintiff denies that defendants have a valid claim under the Deceptive Trade Practices Act, Sec. 17.49(c) as amended effective to June 1, 2002, and thereafter, providing that the Act shall not apply to the rendition of professional services in providing advice, opinion, or similar skill. Although the amended Act holds that the exceptions do not apply to "an express misrepresentation of a material fact that cannot be characterized as advice, judgment or opinion," defendants' allegations do not fall within the ambit of such exceptions.

Plaintiff denies that the defendants have suffered any damages as a proximate cause of any act, conduct or omission of the Plaintiff during the times that he represented the defendants.

Defendants' counterclaims are contrary to the facts and are not supported by the alternatives suggested by defendants as creating any liability or damages against Plaintiff.

XXIV.

DEFENDANTS' FEE CLAIM IS BARRED BY LIMITATIONS

Without waiving such denials, Plaintiff alleges the claims made by the defendants for alleged expert medical fees of Dr. Wohlfahrt is barred by Sec. 16.001, Civil Procedure & Remedies Code, a Four-Year Statute of Limitations applicable to debts for services. The claim for expert fees is an independent cause of action which is not a legal or lawful counterclaim offset to Plaintiff's suit for fees and expenses as alleged in this amended petition. The bartering claim is a "defensive claim" to attorney's fees and not a proper counterclaim to Plaintiff's contract claims.

Dr. Wohlfahrt has never testified in any medical malpractice case at the request of the plaintiff, and is estopped to assert a claim for legal services when he judicially admits that he would not testify as an expert in any medical malpractice litigation. A OB/GYN would not be legally competent to testify as an expert in other types of malpractice cases handled by the Plaintiff. There was no evidence by deposition or on prior trial that he had actually reviewed more than two cases at Plaintiff's request.

XXVII.

FAILURE TO COMPLY WITH SEC. 17.505, BUS. & C. CODE

Without waiving Plaintiff's prior affirmative defense of limitations, Plaintiff alleges that defendants failed to give Plaintiff a written notice of the Deceptive Trade Practices violations and damages at least 60 days before filing the counterclaim pursuant to Sec. 17.505(a) of the Code, would preclude defendants' prosecution of this suit. Plaintiff specifically pleads that he did not receive a written notice as required by the Code. Proper notice must be given before suit

is filed in order to activate the right to recover punitive damages.

XXVIII.

LACK OF JURISDICTION OF THE APPELLATE COURT TO REMAND

The appellate court lacked fact-finding jurisdiction to hold that defendants' attorney "did not intend to take a nonsuit of part of the counterclaims."

Plaintiff prays that he recover judgment for his reasonable attorney's fees and expenses in connection with the prosecution of this suit and postjudgment interest thereon as permitted under the laws of the State of Texas.

Plaintiff prays that his affirmative defenses be sustained and that a take-nothing judgment against Plaintiff be granted, and that Plaintiff's plea of limitations be sustained as to the multiple and alternative causes of action or theories of recovery or damages as asserted by defendants.

Plaintiff further prays that he recover judgment against the defendants, jointly and severally, based upon the debts alleged herein, and that he have such other and further relief, in law and in equity, to which he is justly entitled.

JOHN H. HOLLOWAY

/s/ John H. Holloway
JOHN H. HOLLOWAY
Plaintiff, pro se
State Bar No. 09886000
9225 Katy Freeway, Suite 425
Houston, Texas 77024
(713) 464-9264/FAX 464-3711

AFFIDAVIT ATTACHED.

APPENDIX E

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
129TH JUDICIAL DISTRICT

[Filed Illegible]

No. 92-010256

JOHN H. HOLLOWAY,
Plaintiff,

v.

DOUGLAS W. WOHLFAHRT, M.D. and LYNN WOHLFAHRT,
Defendants.

COUNTER-PLAINTIFFS' FIRST AMENDED
COUNTERCLAIM AND ANSWER TO
PLAINTIFF'S FOURTH AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW DOUGLAS and LYNN WOHLFAHRT, Defendants and Counter-Plaintiffs in the above-styled suit, and file this their first amended counter-claim and answer to Plaintiffs' fourth amended petition, and for cause of action would show this Court as follows:

I.

PARTIES

1. The counter-claim defendant, JOHN H. HOLLOWAY, is a licensed attorney who practices law in the state of Texas. He has made a general appearance pro se in the above-styled cause and may be served according to the Texas Rules of Civil Procedure.

2. Counter-Plaintiff DOUGLAS WOHLFAHRT is a physician who is licensed to practice medicine in the state of Texas. Counter-Plaintiff LYNN WOHLFAHRT is his wife. Both are residents of HarriS, County, Texas.

II.

JURISDICTION AND VENUE

3. The amount in controversy exceeds the minimum jurisdictional limits of this Court, and venue is proper in Harris County, Texas.

III.

FACTUAL BACKGROUND

A. *The Agreement for the Mutual Exchange of Professional Services*

4. From 1984 through 1991, Counter-Plaintiff DR. WOHLFAHRT and Counter-Defendant, JOHN HOLLOWAY (hereinafter HOLLOWAY), mutually agreed to exchange their professional services. HOLLOWAY's legal practice included cases involving medical malpractice, and DR. WOHLFAHRT agreed to review the medical records of various potential and existing clients of HOLLOWAY and advise HOLLOWAY regarding the strength of the claims presented by those clients. Additionally, DR. WOHLFAHRT provided medical treatment and advice to HOLLOWAY personally and to members of HOLLOWAY's family. In exchange, HOLLOWAY agreed to handle miscellaneous legal matters for the WOHLFAHRTs.

5. This agreement regarding the exchange of professional services continued for more than seven years. During this time period, DR. WOHLFAHRT provided medical expert consultation services to Plaintiff regarding malpractice files. In exchange, Plaintiff handled numerous legal matters for the WOHLFAHRTs, several of which were resolved without the filing of a lawsuit.

6. Plaintiff disputes the existence of an arrangement for the exchange of professional services. Plaintiffs petition states that there was an agreement for his ". . . fee to be paid on the closing of a legal or personal matter." (Plaintiffs Fourth Amended Petition. page 2, paragraph II), based upon a rate of not less than $250 per hour, which would be adjusted depending on, among other things, "the benefits gained or received by defendants as a result of such legal services . . ."

7. Despite such representations, no bill for legal fees on any of the forty-two subject files was ever generated by Plaintiff before the filing of this suit. This is true despite the fact that thirty-five of these files, according to Plaintiff's own documentation, had been closed for at least one year, and at least ten of the files had been closed for more than four years prior to the filing of suit.

8. Contrary to the representations made by Plaintiff, forty-one of the forty-two files for which Plaintiff now sues for fees in the instant action, Cause No. 92-010256, were undertaken by Plaintiff in connection with this agreement for the mutual exchange of professional services. This is also true of the *Schneider* suit, the legal fees for which are the subject of an amended petition filed in a companion case, Cause No. 92-010589. And this is also true of the initial work, undertaken by Plaintiff from approximately September 1988 until July 1990 as DR. WOHLFAHRT's attorney in the *Mielke* suit, which fees are now the subject of litigation in a third companion suit, Cause No. 92-010590.

B. *Events Related to Deterioration of Relationship*

9. In the latter part of 1991 the relationship between Plaintiff and the WOHLFAHRTs deteriorated. The WOHLFAHRTs began to fear that HOLLOWAY had failed to represent them competently regarding several legal matters, that he was not advising them regarding legal decisions which had been made or were being made by HOLLOWAY on their

behalf, and that he was compromising their interests with respect to legal matters entrusted to him. Additionally, DR. WOHLFAHRT had become uncomfortable regarding pressure from HOLLOWAY, who solicited medical opinions which were incompatible with DR. WOHLFAHRT's professional judgment.

10. Specifically, there were transactions involving three files which led to deterioration in the relationship between the parties: the *Mielke* file, the *Alief Alamo Bank* file, and the *Stewart/Hanks* file.

The *Mielke* Case

11. Mary *Mielke* was, for a short time, a patient of DR. WOHLFAHRT's. In 1988 she sued DR. WOHLFAHRT and another physician for medical malpractice, in a suit styled *Mary Mielke v. Schreiber and Wohlfahrt*, Cause No. 88-44681, filed in the 334th Judicial District Court. For reasons unrelated to this suit, DR. WOHLFAHRT's malpractice insurance carrier was forced into liquidation, leaving DR. WOHLFAHRT without malpractice coverage, and Plaintiff agreed to represent DR. WOHLFAHRT in this suit. This representation, undertaken consistent with the agreement for the mutual exchange of professional services, continued from September 1988 until July 1990. No bill for Plaintiffs legal services was ever sent for this representation of DR. WOHLFAHRT as a defendant in the *Mielke* suit, and no retainer was paid.

12. In July 1990 the *Mielke* file was transferred to the law firm of Sheinfeld, Maley & Kay with an understanding that a 'tail coverage' provision of DR. WOHLFAHRT's current malpractice policy could be invoked to cover the defense costs for the *Mielke* case. By March 1991 the new carrier had denied coverage for these costs, and, faced with enormous legal defense fees from the Sheinfeld firm relating to *Mielke*, the WOHLFAHRTs brought the file back to Plaintiff, who

required a $10,000 retainer prior to accepting the file. This retainer was paid with a check dated April 30, 1991, and on May 7, 1991 the order was signed substituting HOLLOWAY as counsel for WOHLFAHRT in the *Mielke* suit. Plaintiff now denies that this payment was paid to retain his services in the *Mielke* suit, and asserts that it was applied to the "general accounts", although a review of recently-filed amended pleadings demonstrates that Plaintiff has dropped this $10,000 payment from the accounting altogether.

13. The *Mielke* case was mediated in November 1991. During the mediation it became clear that Plaintiff had done little or no work on the file, and was not familiar with the contents of any depositions, whose number included that of at least six physicians. It is noteworthy in this regard that Plaintiff's bill for services for work: performed on the *Mielke* file, which bill was provided through discovery after suit was filed, reflects fifty-six hours relating to this second representation by Plaintiff on the *Mielke* case. Six of these hours relate to substituting in or withdrawing from the file; six and one-half hours relate to a mediation; and forty hours are reported collectively under a single entry, which bears no date, and reads:

> Estimated time in handling file, reference to preparation; review of all records; additional conferences with client re file; estimate is minimum time expended

14. Shortly after the mediation, the WOHLFAHRTs discussed their concerns with Plaintiff, and advised him that they intended to seek other counsel for the case and wanted a refund of the *Mielke* retainer. Although espousing an acquiescence to this decision, Plaintiff then began a course of conduct which embraced such trickery, deceit, fiduciary breaches and egregious violations of the canon of ethics as to make him culpable for disbarment proceedings.

Alief Alamo Bank

15. The first manifestation of Plaintiff's treachery is demonstrated in the file identified as the *Alief Alamo Bank* matter. Plaintiff has, incidentally, sued the WOHLFAHRTs for $3,000 for legal services he alleges were provided relating to this file from November 19, 1991 through November 23, 1991. Plaintiff manipulated knowledge obtained in the Alief Alamo Bank matter to fraudulently assert a lien on two vehicles owned by the WOHLFAHRTs, which lien documents were generated by altering title documents obtained by Plaintiff at a much earlier date for an espoused purpose which was unrelated to any lien or discussions of a lien.

Background—Alief Alamo Bank

16. In June 1991 the WOHLFAHRTs had obtained a loan from Alief Alamo Bank to cover a large medical malpractice insurance premium. The note was reduced and extended in September 1991 in the principal amount of $77,186.27. The note was secured by a 1991 Mercedes Benz 300SL convertible and a $5,000 certificate of deposit, and bore a maturity date of November 8, 1991. The note contained provisions which required proof of insurance on the vehicle, and gave the bank the option of making demand on the note or obtaining coverage at the borrower's expense in the event that no proof of insurance was provided.

17. By letter dated November 7, 1991, the bank advised the WOHLFAHRTs that it needed certain financial information by November 30, 1991, as well as proof of insurance on the Mercedes. The letter contained no notice that the bank intended to call the note.

18. Without further notice, on November 14, 1991 the bank seized funds from the WOHLFAHRTs' office and personal accounts. By letter dated the following day, November 15, 1991, the bank sent its notice of default, acknowledged that debits totalling $17,558.38 had been

applied to the loan balance, and made demand on the $61,043.01 which remained outstanding on the loan. The basis for this decision to accelerate the note was recited to be the failure to provide the financial information (which the bank requested in the November 7th letter be received by November 30th) and that the bank had no proof of insurance on the vehicle after November 1, 1991.

19. In fact, there had never been a lapse in coverage on the Mercedes, and the bank had been advised of the carrier and the insurance agency handling the insurance. The WOHLFAHRTs had several thousand dollars in outstanding checks at the time of Alief Alamo Bank's action, which checks were returned unpaid, and the WOHLFAHRTs threatened to sue the bank.

20. LYNN WOHLFAHRT handled most of the financial transactions for the family, and mentioned to Plaintiff the actions of Alief Alamo Bank during the course of discussing a return of the $10,000 *Mielke* retainer. Plaintiff advised her that his son-in-law in Austin, Texas was interested in purchasing such a Mercedes, and Plaintiffs communications with Alief Alamo Bank, purportedly made on the WOHLFAHRT's behalf, were, in fact, related to Plaintiff's personal interest on behalf of his son-in-law as a prospective purchaser of the vehicle.

21. Several months prior to November 1991, the WOHLFAHRTs had made a decision to sell three of their vehicles, a 1990 GMC Suburban, 1990 Pontiac Bonneville, and a 1986 Porsche. There were no liens on any of these vehicles. Plaintiff, who became aware of this decision, volunteered to assist them in these sales, and stated that he had sold numerous vehicles from his highly visible law office parking lot. Plaintiff advised LYNN WOHLFAHRT to leave signed title certificates at his office, to facilitate a sale when a buyer was found. In the summer of 1991, LYNN WOHLFAHRT signed the title certificates on two of the vehicles, the

Pontiac and the GMC Suburban, and left them with Plaintiff at his office.

22. During the same time period in which LYNN WOHLFAHRT negotiated the refund of the *Mielke* retainer, she sought a return of the title certificates, as no sales had been forthcoming. She was told on various occasions by Plaintiff and by members of his staff that the certificates could not be located.

23. During the course of his discussions with Alief Alamo Bank, Plaintiff learned that the bank was willing to renew the note and return to the WOHLFAHRTs $10,000 of the money which had been debited from their accounts. Plaintiff engaged in acts of fraud against the WOHLFAHRTs which were effected in the following manner:

a. In response to the WOHLFAHRTs' request for a return of the *Mielke* retainer, Plaintiff issued a check dated November 22, 1991 to the WOHLFAHRTs for $10,000.

b. Plaintiff added language to the title certificates on the GMC Suburban and the Pontiac Bonneville, recently reported to LYNN WOHLFAHRT as having been misplaced, to reflect that new titles were being issued to record a lien in favor of HOLLOWAY for an amount of $10,000 on each vehicle. His daughter, Susan McElroy, notarized that LYNN WOHLFAHRT's signatures, actually executed without a date in the summer of 1991, were executed in her presence on November 21, 1991, the day before the return of the *Mielke* funds.

c. Alief Alamo Bank issued the WOHLFAHRTs a cashier's check dated Nov comber 23, 1991 in the amount of $10,000, characterized as 'loan proceeds.'

d. Plaintiff asserts in his pleadings that his $10,000 check was a loan which the WOHLFAHRTs desperately

needed to cover the checks which remained outstanding after the actions of Alief Alamo Bank. In fact, the $10.000 check from HOLLOWAY was deposited into an account at a different bank, and was not used to cover the outstanding checks at Alief Alamo Bank.

e. Plaintiff presents his $10,000 payment as a loan made in the spirit of charity to assist the WOHLFAHRTs through a period of financial crisis. The following facts belie this position. During this same time period, HOLLOWAY, as attorney for the WOHLFAHRTs in a suit styled *Wohlfahrt v. Clyde and Linda Hanks*, Cause No. 91-47583, received a settlement check for $5,000. HOLLOWAY had settled this case without the permission of the WOHLFAHRTs, and, on November 23, 1991, the day after the purported 'loan', HOLLOWAY converted the entire proceeds to his own use, asserting that the WOHLFAHRTs owed these monies to him for past attorneys' fees.

f. Meanwhile, the WOHLFAHRTs were unaware of the alterations on the title documents. Having been told by HOLLOWAY that the title documents could not be located, LYNN WOHLFAHRT obtained duplicate titles, and sold one of the vehicles to Leo Jarnigan Pontiac, who, in turn, kept the vehicle for a time period, and sold it to a customer. In the interim, Plaintiff recorded his lien on this vehicle, and 'clouded' Leo Jarnigan's transfer of the title to its customer. Leo Jarnigan filed a criminal complaint against LYNN WOHLFAHRT with the Harris County's District Attorney. It was only at great financial expense, humiliation, and inconvenience over several months that LYNN WOHLFAHRT was cleared of the charges. Meanwhile, Plaintiff required Leo Jarnigan to pay him $10,000 for the release of his lien.

g. Plaintiff was aware of the charges which had been brought against LYNN WOHLFAHRT, and there is correspondence from HOLLOWAY to Leo Jarnigan which demonstrates that it was his opinion that the filing of these charges would promote a settlement of his case against them. The WOHLFAHRTs' attorneys' fees relating to LYNN WOHLFAHRT's defense in the criminal case exceeded $10,000.

24. Plaintiff had alleged in the instant action, until the filing of the fourth amended petition, that the WOHLFAHRTs owed him $15,000 for his representation of DR. WOHLFAHRT in the *Mielke* case. Only through discovery in this case did the WOHLFAHRTs receive Plaintiffs bill for the work he performed on the *Mielke* case. This bill recites that between September 1988 and July 1990. Forty of those hours are described in a single entry, which states:

9-8-88	All legal matters; conference with clients;
to 4-12-90	T/Cs to atty. etc. (estimated)

25. The WOHLFAHRTs deny that there was any agreement except for the mutual exchange of professional services relating to this first portion of Plaintiffs representation in the *Mielke* file.

26. On March 6, 1992, approximately two weeks after DR. WOHLFAHRT received a favorable jury verdict in the *Mielke* suit, HOLLOWAY filed this suit and two companion suits against the WOHLFAHRTs, alleging a panoply of manufactured causes. In the instant suit HOLLOWAY has sued for attorneys' fees on forty-two different matters. These include files recited in the petition to have been closed as long as seven years prior to the filing of suit. Almost all of these forty-two matters fell within the agreement between the parties for the exchange of services. With very few exceptions the payments by the WOHLFAHRTs to HOLLOWAY, recited in his petition as totalling more than $20,000, were

payments to cover cost reimbursements on the files, not legal fees.

The *Stewart Title-Hanks* File

27. The last payment recited by HOLLOWAY in his petition, identified as "Stewart Title Check" for $3,969, is actually proceeds from a $5,000 settlement check to the WOHLFAHRTs, referenced above, less certain dubious costs which were deducted by HOLLOWAY, which remainder HOLLOWAY then converted to his own use.

28. The *Stewart-Hanks* suit was brought seeking a return of $6,000 in funds escrowed by the WOHLFAHRTs as earnest money relating to the purchase of a residence. HOLLOWAY undertook the file in early 1990, and allowed the statute of limitations to expire on a valid deceptive trade practice claim against the sellers, who had actually lost the home to a foreclosure, and against the title company, who refused to return the escrowed funds. HOLLOWAY filed the suit for nothing more than a return of the escrowed funds, and settled the case without the WOHLFAHRTs' knowledge or permission, under terms where HOLLOWAY asserts that he agreed to return to the defendants a total of $800. HOLLOWAY received the check on November 23, 1991, but, after obtaining the signatures of the WOHLFAHRTs, refused to tender to them any part of the funds. Through this suit the WOHLFAHRTs seek a return of these funds. wrongfully withheld.

29. During the discovery related to this suit, the WOHL-FAHRTs have become aware of an enormous number of instances of fraud. legal malpractice, and deceptive trade practices committed by HOLLOWAY during the course of his representation of their legal matters. Some of these are identified above, under paragraph 20. Additionally, the WOHLFAHRTs have become aware of conduct by HOLLO-WAY which constitutes fraud regarding his claim for the attorneys' fees upon which this suit is based.

30. As a part of this fraud, HOLLOWAY has sued the WOHLFAHRTs in a companion suit, Cause No. 92-010589, also pending before this Court. In that suit HOLLOWAY alleges that the WOHLFAHRTs owe him a principal amount totalling $8,653.21 for advances made on three files from 1985 to 1987. These 'loans' relate to expenses and settlements in three files for which HOLLOWAY seeks attorneys' fees in the case at bar, to wit: Russel Lowe (sic), Texas Commerce Bank, and Millar Wallcovering [Item 3, Item 6, and Item 8, respectively, paragraph III, Plaintiff's Fourth Amended Petition]. The WOHLFAHRTs reimbursed HOLLOWAY for the 'loans' which are the subject of the other suit, but HOLLOWAY has, in the instant suit, mischaracterized these reimbursements as payments made toward the outstanding attorneys' fees which he asserts he was owed (Paragraph VI of his Fourth Amended Petition).

31. Also in the above-identified companion suit, Cause No. 92-010589, HOLLOWAY has asserted a claim for a fifty percent contingency interest in a suit styled *Wohlfahrt v. Larry Gene Schneider, dba Nemec Medical Center*, Adversary No. 88-0755, in Re Bankruptcy No. 87-07867-H1-7. This contingency interest is based upon a fabricated and forged agreement bearing a date of February 18, 1989, and purporting to bear the signatures of both WOHLFAHRTs. When this forged agreement was purportedly signed, the issues in the *Schneider* suit had already been litigated in North Carolina, and the litigation in the bankruptcy court, which concerned issues relating to the non-dischargeability of the debt, had been ongoing for approximately one year. Without regard to the WOHLFAHRTs' allegations that the document was forged, a presumption of overreaching attaches to such a contingency agreement, which surfaced so late in the proceedings.

32. Despite the fact that HOLLOWAY has been in litigation with the WOHLFAHRTs in these three cases since

March 1992, and despite numerous requests, he has refused to return the *Schneider* file and continues, as of the filing of this pleading, to present himself as their counsel with respect to the *Schneider* case. The face amount of the *Schneider* judgment is now approximately $100,000.

33. In the third companion suit, No. 92-010590, also pending in this Court, HOLLOWAY has sued for the return of the $10,000 *Mielke* case retainer, which he paid to the WOHLFAHRTs in November 1991. In that suit HOLLOWAY asserts that this money was not a refund of the *Mielke* retainer, but was, in fact, the 'loan' secured by the WOHLFAHRTs' vehicles. Plaintiff alleges that the WOHLFAHRTs agreed to give him a security interest in two unencumbered vehicles, a 1990 Pontiac Bonneville and a 1990 GMC Suburban, neither of which was a year old. In fact, as discussed above, HOLLOWAY obtained the WOHLFAHRTs' title documents under a ruse, and when the WOHLFAHRTs sought the return of these documents, they were told by HOLLOWAY and his staff that the documents could not be located. The WOHLFAHRTs obtained duplicate titles to the vehicles, and sold the Pontiac to Jarnigan Pontiac, a car dealership, on February 20, 1992. HOLLOWAY recorded a lien on this vehicle on March 11, 1992. Jarnigan Pontiac sold the vehicle on March 26, 1992, only to discover HOLLOWAY's $10,000 recorded lien encumbered the vehicle.

34. HOLLOWAY released this lien on July 27, 1992, in consideration of a payment $10,000 to him from Jarnigan Pontiac. As a result of HOLLOWAY's conduct, Counter-Plaintiff LYNN WOHLFAHRT was forced to submit to the filing of criminal charges and suffered the indignity, great financial expense, and mental anguish relating to those charges, as mentioned previously regarding the Alief Alamo Bank Fraud.

35. The title documents which were used by HOLLOWAY were obtained from the WOHLFAHRTs through

trickery. Her signature was notarized by HOLLOWAY's daughter, Susan McElroy and bears a date which was actually months after LYNN WOHLFAHRT signed the titles. With respect to Plaintiff's true motives, it is noteworthy that during this same time period HOLLOWAY also sought and obtained a duplicate title of an unencumbered Porsche owned by the WOHLFAHRTs. Plaintiff has never explained this conduct, other than that it was done as some vague gesture to assist the WOHLFAHRTs. It was first revealed that he had done this in his deposition in December 1993, at which time he still held the documents which he had received from the State.

36. An examination of the forty-two files which form the basis for the instant suit reveal an embarrassing array of overreaching, overbilling, incompetence, and legal malpractice.

37. During the course of his association with the WOHLFAHRTs, Plaintiff has engaged in all manner of slander against them, some of which continues through the present day, for which the WOHLFAHRTs also sue.

IV.

COUNT ONE

FRAUD

38. Counter-Plaintiffs submit that HOLLOWAY has committed numerous acts of fraud against them. These acts include the following:

a. Seeking attorneys' fees for work which was not performed;

b. Misrepresenting the merits of a cause of action in order to generate unnecessary fees;

c. Misrepresenting the status or outcome of cases contrary to the best interests of the clients;

d. Forging the February 18, 1989 'loan' agreement;

e. Fraudulently obtaining vehicle title documents through trickery and fraudulently recording a lien on the vehicles;

f. Obtaining DR. WOHLFAHRT's medical services and expert medical opinions with the fraudulent intent to later deny that the parties had agreed to mutually exchange professional services;

g. Forging a document which purports to assign to HOLLOWAY a fifty percent interest in the *Schneider* suit. and which asserts to the existence of three debts which, in fact, have been paid.

Counter-Plaintiffs submit that all of HOLLOWAY's claims contained in each of the three suits are based upon fraud.

SPECIFIC ACTS OF FRAUD

Cases Where Plaintiff Sued But Did No Legal Work

39. *Melva Starghill—$1,500*

Plaintiff has asserted that Defendant-Counter-Plaintiffs owe him $1,500.00 for legal services performed relating to a claim made by Melva Starghill. In fact, Defendant-Counter-Plaintiffs were represented by Donna Bounds, an attorney with the firm Lorance & Thompson.

40. *Tracy Uhl—$1,875*

Plaintiff has asserted that Defendant-Counter-Plaintiffs owe him $1,875.00 for legal services performed relating to a claim brought by Tracy Uhl against the WOHLFAHRT's son, Christopher. Defendant-Counter-Plaintiff's attorney on this matter was John Munier, not Plaintiff.

41. *Texas Commerce Bank—Austin $4,500*

Plaintiff has asserted that Defendant-Counter-Plaintiffs owe him $4,500.00 for legal services he performed relating to a suit filed against the WOHLFAHRTs by Texas Commerce

Bank - Austin. In fact. Plaintiff performed no legal services of any kind on this file. He paid the last $3,000 required to satisfy the judgment, and obtained releases of the lien. Plaintiff did not even perform the rudimentary task of filing the releases in the counties in which the lien was recorded.

42. *Sheinfeld Claim—$5,000*

Plaintiff has asserted that Defendant-Counter-Plaintiffs owe him $5,000.00 for legal services he performed relating to a demand by the firm of Sheinfeld, Maley & Kay for payment of attorney's fees generated relating to two cases, *Mielke* and *Troy Thompson*. In fact, plaintiff did very little, if any, work relating to this attorney's fees dispute which was, in fact, amicably resolved as a result of the efforts of Defendant-Counter-Plaintiff LYNN WOHLFAHRT.

43. *Alief Alamo Bank—$3,000*

Plaintiff asserted that Defendant-Counter-Plaintiffs owe him $3,000.00 for legal services performed relating to a dispute with Alief Alamo Bank. This legal services bill is a fabrication manufactured to support Plaintiff's fraudulent efforts with respect to Defendant-Counter-Plaintiff's automobile titles, addressed elsewhere in this petition.

44. *Buchannan, Garman, and Century 21—$2,000*

Plaintiff has asserted that Defendant-Counter-Plaintiffs owe him a total of $2,000 for legal services performed relating to three cases: Buchannan (listed as Buckman in the petition), Garman, and Century 21. Plaintiff performed no legal work on any of these files.

45. *Millar Wallcovering—$700*

Plaintiff has asserted that Defendant-Counter-Plaintiffs owe him $700 for legal services performed relating to a suit filed against them by Millar Wallcovering. In fact, a default judgment was taken against the WOHLFAHRTs as a direct consequence of Plaintiff's neglect of the file after he received

it. Plaintiff did nothing more on this file than pay the judgment on the same day that Counter-Plaintiff LYNN WOHLFAHRT advised him that the constable was proceeding with a writ of execution. Counter-Plaintiffs submit that Plaintiff immediately paid the judgment because he knew the default was the result of his neglect. Plaintiff has now sued for a return of this payment, which is characterized as a 'loan.' Plaintiff performed no legal services to support his claim for $700.

Claims Where Plaintiff Misrepresented The Merits Of A File In Order To Generate Unnecessary Fees

46. *Gilpin Appeal—$7,500*

Plaintiff filed an appeal of a judgment taken against the WOHLFAHRTs, which appeal had no merit, and misrepresented to the WOHLFAHRTs that the judgment could be overturned on appeal. Plaintiff has charged the WOHLFAHRTs $7,500 for this appellate work, which related to appellate filings on an appeal which was clearly without merit. This filing was merely an effort to generate unnecessary fees.

Misrepresenting The Status Or Outcome Of Cases Contrary To The Best Interests Of The Client

47. *Hanks/Stewart Title—$1.500*

It is through this file that Plaintiff committed one of his most egregious abuses with respect to his representation of the WOHLFAHRTs. The WOHLFAHRTs had placed $6,000 in escrow with the title company as earnest money relating to the purchase of a piece of real estate. Plaintiff filed suit on behalf of the WOHLFAHRTs when the title company refused to return the earnest money even after discovery that the sellers did not, in fact, own the real estate. The case was settled without knowledge or input from the WOHLFAHRTs shortly after suit was filed, through an agreed judgment

signed by Plaintiff and the sellers. That agreed judgment recited that the WOHLFAHRTs would receive all of the money in escrow, and would bear costs of court. Although suit was filed for attorneys' fees incurred, the settlement contained no provision for the payment of attorneys' fees. Plaintiff now asserts that $1,500 are owed as attorneys' fees on this file.

Failing To Represent The Clients' Interests

48. In numerous cases Plaintiff undertook the representation of the WOHLFAHRTs, consistent with their mutual agreement for the exchange of professional services, then neglected their files, failed to file counterclaims, failed to assert affirmative defenses, settled the cases without the authority or knowledge of the WOHLFAHRTs, and later misrepresented the status of the cases and mischaracterized the basis and character of the settlements. Many of the cases for which Plaintiff has now sued for fees fall into this category. Specifically, they include the following, which are identified along with the fees which Plaintiff asserts are owed on each case:

a.	Russell Rowe	$1,600
b.	National Car Rental	400
c.	First Bank of Bellaire	1,000
d.	National Health Labs	625
e.	SmithKline	1,250
f.	Coastal Medical	150
g.	Southwestern Bell	200
h.	Damon Clinical	700
i.	General Medical Corp.	700
j.	Roche BioMedical	1,000
1.	Baylor College of Medicine	1,500
m.	Conrad	4,000

Plaintiff asserts that fees totalling $13,125 are owed on the above eleven files.

49. The WOHLFAHRTs brought these files to Plaintiff, most of which were suits from medical vendors based upon an alleged debt, because a dispute had arisen regarding the services or items provided. In no instance did Plaintiff join issue through a * * * *

COUNT TWO

CASES WHERE PLAINTIFF HAS ENGAGED IN EGREGIOUS OVERBILLING

50. Many of the cases for which Plaintiff has now sued for fees are cases in which Plaintiff has engaged in egregious overbilling. Specifically, they include the following, which are identified along with the fees which Plaintiff asserts are owed on each case:

a.	OB Association Employment	$900
b.	Representation in Insufficient Fund Checks	4,000
c.	Sarmiento Lease Claim	625
d.	Quail Grove residence purchase	1,500
e.	Landmark Chevrolet	500
f.	Alex Smith Academy	1,250
g.	American Express	1,000

51. Plaintiff has asserted in this suit that he is entitled to attorneys' fees of $9,775 for the seven files listed above. The WOHLFAHRTs submit that the work which was done on these files by Plaintiff has a value of not more than $1,500, and that DR. WOHLFAHRT performed services for Plaintiff through evaluations of Plaintiffs medical malpractice files which were of a value far in excess of the legal services provided by Plaintiff to the WOHLFAHRTs.

COUNT THREE

SLANDER. DEFAMATION. AND BREACH OF FIDUCIARY DUTY

52. Plaintiff has slandered and defamed the WOHLFAHRTs to numerous individuals, including opposing counsel in other suits, apparently in an effort to obtain an advantage in the instant action. This slander has occurred as recently as the last year, and involves allegations of unlawful conduct, constituting slander per se, giving rise to punitive damages, for which the WOHLFAHRTs hereby sue.

53. Additionally, Plaintiff has engaged in numerous breaches of his fiduciary duty to his clients, the WOHLFAHRTs, which breaches are described in more detail elsewhere in this petition, and which breaches demonstrate such a wanton disregard for the WOHLFAHRTs' rights as to give rise to an award of punitive damages, for which the WOHLFAHRTs hereby sue.

COUNT FOUR

SUIT FOR SERVICES RENDERED

54. As a direct result of DR. WOHLFAHRT's actions, HOLLOWAY has received and accepted the benefit of DR. WOHLFAHRT's valuable services. The services which WOHLFAHRT provided to HOLLOWAY concerned WOHLFAHRT's review of numerous medical files and records relating to potential malpractice claims and the expression of WOHLFAHRT's opinions regarding the existence or nonexistence of these possible medical malpractice claims. The reasonable value of this service if provided by similar physicians in the community would be an amount in excess of the minimal jurisdictional limits of this court.

55. This cause of action arises by virtue of HOLLOWAY's failure to pay and/or recognize reasonable value of these services rendered by WOHLFAHRT. HOLLOWAY

will be unjustly enriched in an amount in excess of the minimal jurisdictional limits of this Court if allowed to retain the benefit of the services conferred upon him by WOHLFAHRT. It is the reasonable value of these services which WOHLFAHRT now seeks.

COUNT FIVE

BREACH OF CONTRACT

56. DR. WOHLFAHRT and HOLLOWAY entered into an agreement for the mutual exchange of professional services. HOLLOWAY now denies that his legal services were performed in connection with such an agreement, and, further, denies that there was such an agreement. This denial and HOLLOWAY's suit for fees which he performed under this agreement constitutes a breach of contract, for which the WOHLFAHRTs hereby sue.

COUNT SIX

DECEPTIVE TRADE PRACTICES

57. Counter-Plaintiffs are "consumers" as that term is defined by Article 17.41 et seq., Vernon's Texas Codes Annotated, Business & Commerce Code, known as the Deceptive Trade Practices-Consumer Protection Act. HOLLOWAY is a "person" providing "goods" and "services" as defined under the Act. During the course of HOLLOWAY's representation of the WOHLFAHRTs, HOLLOWAY committed numerous unlawful deceptive trade practices, giving rise to a claim for damages by the WOHLFAHRTs under the act. Specifically, HOLLOWAY:

a. Represented that the goods or services were of a particular standard, quality, or grade, when they were of another [Article 17.46(b)(7)];

b. Represented that an agreement conferred or involved rights, remedies, or obligations which it did not have or

involve, or which were prohibited by law [Article 17.46(b)(12)];

c. Represented that work had been performed when the work was not performed [Article 17.46(b)(21)]; and

d. Failed to disclose information concerning his services which was known at the time of the transaction where such failure to disclose was intended to induce the consumer into a transaction into which he would not have entered had the information been disclosed [Article 17.46(b)(23)].

58. Additionally, HOLLOWAY breached implied warranties, which breach gives rise to a claim for damages under Article 17.50(a)(2).

59. Further, HOLLOW AY's conduct constitutes an unconscionable course of action, giving rise to a claim for damages under Article 17.50(a)(3).

COUNT SEVEN

ABUSE OF PROCESS

60. HOLLOWAY's conduct in surreptitiously recording a lien on the WOHLFAHRT's vehicle, and knowingly orchestrating a chain of events which led to the filing of criminal charges against LYNN WOHLFAHRT, constitutes an abuse of process, for which conduct the WOHLFAHRTs seek actual and consequential damages, as well as punitive damage.

ATTORNEYS FEES

61. WOHLFAHRT has agreed to pay the undersigned attorneys their reasonable fees incurred. Accordingly, WOHLFAHRT seeks his reasonable and necessary attorney fees and costs incurred in the prosecution of this claim.

DEFENDANTS' ANSWER TO PLAINTIFFS FOURTH AMENDED PETITION

COME NOW DEFENDANTS, DOUGLAS AND LYNN WOHLFAHRT, and file this their answer to Plaintiff's Fourth Amended Petition, wherein they state as follows:

AFFIRMATIVE DEFENSES
STATUTE OF LIMITATIONS

1. Defendants assert, as an affirmative defense, that Plaintiffs first ten listed claims are barred by the statute of limitations. Plaintiff brought suit on March 6, 1992 for cases which were closed as early as 1985. Defendants assert that the statute of limitations bars recovery on the following claims, which fees represent $21,300.00 of Plaintiffs claim:

a. OB Association employment
b. Sandra Garman
c. Russel Lowe (sic—'Rowe')
d. Gilpin Appeal
e. Melinda Buckman (sic—'Buchannan')
f. Texas Commerce Bank—Austin
g. Century Twenty-One
h. Millar Wallcovering
i. National Car Rental
j. Traffic Tickets - Lynn Wohlfahrt
k. Citizens Bank of Houston

2. Defendants plead further and without waiving the foregoing, allege that Plaintiffs claims are barred by the Doctrine of Estoppel.

3. Defendants plead further that Plaintiffs claims are barred by the Doctrine of Payment.

4. Defendants plead further that Plaintiff's claims are barred by the Doctrine of Laches.

5. Defendants plead further that Plaintiff's claims are barred by the Doctrine of Failure of Consideration.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that Plaintiff take nothing by this suit, and that Defendants recover their costs herein, as well as their attorneys' fees, and such other and further relief to which they may show themselves justly entitled.

With respect to their counterclaims, Counterclaim Plaintiffs DOUGLAS and LYNN WOHLFAHRT request that Counterclaim Defendant JOHN HOLLOWAY be cited to appear and answer, and, upon final trial, Counterclaim Plaintiffs have and recover from Defendant as follows:

1. $150,000 in damages against JOHN H. HOLLOWAY for the reasonable value of DR. WOHLFAHRT's services provided to HOLLOWAY, to members of his family, and to his law practice;

2. $250,000 in actual damages for the deceptive trade practices committed by HOLLOWAY against the WOHLFAHRTs;

3. $250,000 in mental anguish related to the deceptive trade practices committed by HOLLOWAY against the WOHLFAHRTs;

4. $750,000 in punitive damages for the numerous acts of fraud committed by HOLLOWAY;

5. $250,000 for the abuse of process orchestrated by HOLLOWAY in an effort to obtain a favorable advantage in the instant suit;

6. $350,000 in punitive damages relating to HOLLOWAY's conduct which constitutes abuse of process;

7. $350,000 for the slander committed by HOLLOWAY against the WOHLFAHRTs;
8. Treble damages for the knowing nature of HOLLOWAY's conduct constituting deceptive trade practices committed against the WOHLFAHRTs;
9. $5,000 as damages for the monies due on the *Stewart-Hanks* case.
10. $10,000 as damages relating to the attorneys' fees incurred by the WOHLFAHRTs in defending against the criminal charges brought against LYNN WOHLFAHRT as a result of the fraudulently recorded lien on the WOHLFAHRTs' Pontiac;
11. Prejudgment interest at the highest rate allowed by law;
12. Reasonable and necessary attorneys' fees and costs of the court incurred in the prosecution and defense of this claim;
13. Post-judgement interest from the date of the entry of the judgment until paid in full at the highest rate allowed by law; and
14. Such other and further relief to which these Counterclaim Plaintiffs may show themselves to be justly entitled.

Respectfully submitted,

/s/ Constance Y. Singleton
CONSTANCE Y. SINGLETON
1800 Bering Drive; Suite 570
Houston, Texas 77057
(713) 268-1133
FAX (713) 268-1144
SBOT 18435600

ATTORNEY FOR DEFENDANT-COUNTER-PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent, via certified mail, to the following counsel of record, on this the 2nd day of May, 1995:

John H. Holloway
926 Wilcrest
Houston, Texas 77079

/s/ Constance Y. Singleton
CONSTANCE Y. SINGLETON

VERIFICATION

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared Douglas Wohlfahrt, who, being by me duly sworn upon oath stated that he is one of the Defendants in the above-styled and numbered cause, that he has read the foregoing Counter-Plaintiffs First Amended Counter-Claim and Answer to Plaintiffs Amended Petition and that such are true and correct and of his own personal knowledge.

/s/ Douglas Wohlfahrt
DOUGLAS WOHLFAHRT

SUBSCRIBED AND SWORN BEFORE ME on this the 27th day of April, 1995.

/s/ Frances Josephine Phillips
Notary Public in and for the
State of Texas

VERIFICATION

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared Douglas Wohlfahrt, who, being by me duly sworn upon oath stated that he is one of the Defendants in the above-styled and numbered cause, that he has read the foregoing Counter-Plaintiffs First Amended Counter-Claim and Answer to Plaintiffs Amended Petition and that such are true and correct and of his own personal knowledge.

/s/ Lynn Wohlfahrt
LYNN WOHLFAHRT

SUBSCRIBED AND SWORN BEFORE ME on this the 27th day of April, 1995.

/s/ Frances Josephine Phillips
Notary Public in and for the
State of Texas

APPENDIX F

IN THE SUPREME COURT OF TEXAS

No. 05-0836

DOUGLAS WOHLFAHRT, M.D. and LYNN WOHLFAHRT,
Petitioners,

v.

JOHN H. HOLLOWAY,
Respondent.

On Petition for review from Cause No. 14-03-01084-CV
In the Fourteenth Court of Appeals

THE WOHLFAHRT'S RESPONSE TO JOHN H. HOLLOWAY'S CROSS-PETITION FOR REVIEW

Levon G. Hovnatanian
State Bar No. 10059825
Raul H. Suazo
State Bar No. 24003021
Kevin G. Cain
State Bar No. 24012371
Melinda L. McGehee
State Bar No. 24041443
Martin; Disiere, Jefferson & Wisdom, L.L.P.
808 Travis, Suite 1800
Houston, TX 77002
(713) 632-1700—Telephone
(713) 222-0101—Facsimile

stated that the Wohlfahrts "shall take nothing on their time-barred counterclaims against . . . Holloway." CR 1232. He assessed costs against the Wohlfahrts. CR 1232.[3]

D. The Second Reversal

The Wohlfahrts appealed. CR 1341-42. The appeal was assigned to the Fourteenth Court of Appeals, and Holloway was the appellee. The appeal was given cause number 14-03-01084-CV.

A panel of Chief Justice Hedges and Justices Fowler and Edelman reversed and rendered the portions of Judge Reiter's judgments that awarded Holloway a recovery based on quantum meruit, reversed and remanded the portion holding that the Wohlfahrts' DTPA cause of action was time-barred, and affirmed the portion of the judgment awarding Holloway recovery on his debt claims. *Wohlfahrt v. Holloway*, 172 S.W.2d 630, 641-42 (Tex. App.—Houston [14th Dist] 2005, pets. filed); Appendix A at 12; Judgment in Cause No. 14-03-01084-CV; Appendix B.[4] Chief Justice Hedges authored the unanimous opinion. *Wohlfahrt*, 172 S.W.2d at 62; Appendix A at 5.

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[3] On October 29, 2003, Judge Ritter signed yet another final judgment in Cause Nos. 92-010589 and 92-010590. CR 1316-17. This last judgment made no change from the previous final judgment in Cause Nos. 92-010589 and 92-010590, and the judgment states on its face that Judge Reiter signed it only because he believed that the previous final judgment in Cause Nos. 92-010589 and 92-010590 had been lost. CR 1317. That previous final judgment is present in the clerk's record. CR 1229.

[4] In its opinion, the panel also dismissed for want of jurisdiction a separate appeal brought by Holloway challenging the taxation of appellate costs against him after the first reversal. *Wohlfahrt*, 172 S.W.2d at 642; Appendix A at 12. That appeal was docketed under a separate cause number, 14-03-01130-CV. The panel disposed of both appeals, 14-03-01084-CV and 14-03-01130-CV, in its single opinion, but issued a separate judgment for 14-03-01130-CV, Appendix C.

(The panel's remand of the Wohlfahrts' DTPA counterclaim for the trial court to consider "Holloway's additional arguments regarding the counterclaims" rather than rendering judgment for the Wohlfahrts on the jury's findings on their DTPA counterclaim, including their DIM actual damages, DTPA mental anguish damages, and DTPA attorneys' fees, is the subject of the Wohlfahrts' petition for review. In their petition, the Wohlfahrts also preserved the right to argue that the panel erred in affirming Judge Reiter's award of post-judgment interest on Holloway's debt claims.)

ISSUES PRESENTED

1. Judge Reiter awarded Holloway "the value of his attorney's fees" purportedly earned from the Wohlfahrts. The relevant final judgment specifies that this award to Holloway is in quantum meruit.

But Holloway expressly waived any claim for quantum meruit at trial, including in the charge conference, and failed to obtain a finding on any element of quantum meruit. Nor did he obtain a finding on quantum meruit damages. Considering these facts, did the court of appeals err in holding that Holloway was not entitled to recover in quantum meruit?

2. Judge Reiter disregarded the jury's findings for the Wohlfahrts on their DTPA counterclaim and ruled that the counterclaim was "time-barred."

A. In a previous opinion in this case, the First Court of Appeals explicitly held that the Wohlfahrts' DTPA counterclaim was not time-barred. Under the law of the case doctrine, did the court of appeals err in holding that the counterclaim was not time-barred?

B. Holloway did not submit a limitations issue, and correspondingly, the jury did not make any limitations findings. Considering these facts, did the court of appeals err in holding that the Wohlfahrts' DTPA counterclaim was not "time-barred"?

C. The Wohlfahrts' DTPA counterclaim "relates back" to their first counterclaim, which was filed within limitations, Considering this fact, did the court of appeals err in holding that the Wohlfahrts' DTPA counterclaim was not "time-barred"?

D. The Wohlfahrts had no duty to prove or obtain a finding on a defense to the affirmative defense of limitations when Holloway neither proved nor obtained findings on limitations. Considering this fact, did the court of appeals err in holding that the Wohlfahrts had no duty to obtain a finding on the discovery rule?

E. Did the Wohlfahrts fail to challenge Judge Reiter's JNOV on appeal?

F. Did the Wohlfahrts waive their DTPA counterclaim by not bringing a negligence claim for legal Malpractice?

STATEMENT OF FACTS[5]

This case is a business dispute between Dr. and Mrs. Wohlfahrt on the one hand and John Holloway, a plaintiffs medical malpractice lawyer (RR V, 97, 184-85; VI, 138), on the other. *See* CR 284-330, 516.62 (parties' live pleadings). The Wohlfahrts say that they and Holloway had a bartering agreement under which Dr. Wohlfahrt would consult on Holloway's medical malpractice files and Holloway would handle the Wohlfahrts' legal matters. CR 522; RR IV, 8, 11, 21, 29, 30; V, 11, 17, 44, 60, 168; VIII, 62, 64; X, 223. According to Dr. Wohlfahrt, he told Holloway that he would only consult; he would not provide written reports or testify in court, RR IV, 10, 15, 16; X, 234, 242; XI, 14, 15; accord RR VIII, 64-65. Dr. Wohlfahrt made it clear that all he was

[5] Holloway's petition does not offer a statement of facts and thus does not state whether the court of appeals' opinion correctly stated the nature of the case. *See* Tex. R. App. P. 53.2(g). The Wohlfahrts believe that it did.

willing to do was review files to determine if there was some merit to the potential medical malpractice case. RR V, 102. He saw his role as trying to prevent frivolous medical malpractice suits. RR V, 102.

However, Mrs. Wohlfahrt began to feel uncomfortable about Holloway's handling of his medical malpractice cases. RR X, 172-73. When she would bring files to Holloway, he would talk about filing lawsuits just to try to force the defendant to choose settlement over mounting a costly defense. RR. X, 172. He would talk about using Dr. Wohlfahrt's work to further that end. RR X, He would acknowledge that a case may not have merit, but state his intent to use the lawsuit to force a settlement so he could "get something out of it." RR X, 173. Finally, the bartering agreement came to an end when Dr. Wohlfahrt discharged Holloway. RR V, 149-50, 152, 169; RR X, 220-21.

According to Holloway, there was no bartering agreement between him and the Wohlfahrts. RR V, 190, 191; XI, 71-72; *See* RR VI, 117-18. He claims that the parties entered into a contract under which the Wohlfahrts would pay him for his legal services. CR 284. There was, however, abundant evidence that he never expected to be paid for his legal services. *See* RR X, 190, 195 (Holloway never sent the Wohlfahrts a bill); RR VIII, 206 (Holloway never asked the Wohlfahrts to pay for his legal services until the time he filed his lawsuit); RR IV, 21, 29, 30; V, 11, 70 (Holloway would not charge the Wohlfahrts for his services); RR V, 106 (Dr. Wohlfahrt and Holloway did not intend to charge each other); RR V, 98-99 (Holloway never said he would bill the Wohlfahrts or mentioned any sort of contingency fee); RR XI, 11 (Holloway never discussed charging the Wohlfahrts a fee for his services on any of the legal matters he handled for them); RR V, 133, 134, 145, 171; VIII, 117-18, 123-24, 221; IX, *9; X, 60, 187, 195, 223; XI, 11 (during entire duration of bartering agreement, Holloway never sent the Wohlfahrts a bill for his

services); RR V, 171 (Wohlfahrts had no idea Holloway was going to charge them anything); RR X, 187 (Mrs. Wohlfahrt never expected a bill from Holloway for his legal services); RR IV, 8, 11, 21, 29, 30; V, 11, 17, 44, 60, 168; VIII, 62, 64, 116, 131, 135, 218; X, 186, 190, 188, 223 (parties had bartering agreement).

SUMMARY OF THE ARGUMENT

The court of appeals was correct that Holloway cannot recover the purported value of his attorney's fees. Holloway waived any recovery in quantum meruit by refusing the submission of a quantum meruit question to the jury. Correspondingly, Holloway failed to obtain a quantum meruit finding.

The court of appeals was also correct that the Wohlfahrts had no duty to obtain a finding on the discovery rule. Once the defendant establishes as a matter of law that the plaintiffs cause of action is barred, *then* the plaintiff has the burden to obtain findings to defeat the limitations defense. But Holloway did not request a limitations question, let alone obtain a limitations finding.

The court of appeals was also correct that the Wohlfahrts' counterclaim was timely. The counterclaim was timely under the law of the case doctrine. Furthermore, Holloway did not request a question on limitations or obtain a limitations finding. Further still, under section 16.068 of the Texas Civil Practice and Remedies Code, the Wohlfahrts' counterclaim was timely.

The Wohlfahrts certainly challenged the JNOV on appeal. And last, the Wohlfahrts did not waive their DTPA counterclaim by not forgoing a legal malpractice cause of action.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT HOLLOWAY WAS NOT ENTITLED RECOVER THE PURPORTED VALUE OF HIS ATTORNEY'S FEES.

A. Holloway Cannot Recover In Quantum Meruit.

1. Holloway waived any recovery in quantum meruit.

The plaintiff has the burden to obtain affirmative answers to jury questions on the necessary elements of his cause of action. *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667, 668 (Tex. 1990). Here, not only did Holloway fail to obtain favorable jury findings on quantum meruit, he affirmatively refused to submit the claim to the jury—twice.

First, during trial, Holloway expressly disavowed any claim for quantum meruit:

> Mr. Suazo [one of the Wohlfahrts' trial attorneys): He's seeking—I believe he's Seeking quantum meruit.
>
> Mr. Holloway: *I am not ever doing that.*
>
> The Court: See, I want to know that and till I see the charge prepared.
>
> Mr. Holloway: Quantum meruit.
>
> The Court: Are you—
>
> Mr. Holloway: *I am just on the attorney's fees agreement pure and simple.* RR VIII, 230 (emphasis added).

Despite Holloway's pronouncements in open court, Judge Reiter said at the conclusion of the evidence that "I would intend to present both a claim for the Plaintiff and as to the contract for services and also on quantum meruit." RR XI, 83. But at the charge conference, when the Wolfahrts attempted

to submit a question to the jury on Mr. Holloway's quantum meruit claim, Holloway declined to submit the claim:

> The Court: What is the next question you have in mind?
>
> Mr. Suazo: Judge, we have a quantum meruit.
>
> The Court: You don't want quantum meruit?
>
> Mr. Holloway: *I don't really care.*
>
> The Court: All right. *Then I will leave it out.* What else does the defense want?

RR XI, 119-20 (emphasis added). At that point, Judge Reiter handed the Wohlfahrts' proposed quantum meruit question to Holloway—who promptly wadded it up and tossed it in a nearby trash can. CR 13113 (evidence). Holloway did not request a quantum meruit question of his own, so the jury was not submitted any quantum meruit question on Holloway's claim regarding fees. Holloway did not object to the omission of a quantum meruit question on his behalf.

By failing to request the submission of a quantum meruit question—and, independently, by expressly disavowing a quantum merit claim—Holloway waived any recovery in quantum meruit. *See Ramos*, 784 S.W.2d at 668; *Akin v. Dahl*, 661 S.W.2d 911, 913 (Tex. 1983).

2. Holloway failed to obtain any quantum meruit finding.

In post-verdict hearings, Holloway changed his approach to quantum meruit and argued that in fact, he had not waived it. RR XIV, 20-21; XV, 15-16. He asserted that he was not required to obtain quantum meruit findings in order to recover in quantum meruit. RR XV, 15-18, 25-26. Judge Reiter ultimately sided with Holloway, ruling that he did not need any findings to recover in quantum meruit aside from the amounts filled in for Question 2A. RR XV, 26-27.

But Judge Reiter erred. The plaintiff has the burden of *proving* quantum meruit. *Myrex Indus. v. Ortolon*, 126 S.W.3d 548, 550 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). And when the plaintiff does not request *findings* on quantum meruit, there can be no recovery on that theory. *Arch Constr., Inc. v. Tyburec*, 730 S.W.2d 47, 50 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

Stated another way, "Upon appeal all independent grounds of recovery or defense not conclusively established under the evidence and no element of which is submitted or requested are waived." TEX. R. CIV. P. 279. That is the case here. The "elements" of a quantum meruit claim are that (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services or materials were accepted by the person sought to be charged; used and enjoyed by him; (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged. *Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990); *Clear Lake City Water Auth. v. Kirby Lake Dev., Ltd.*, 123 S.W.3d 735, 753-54 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). A proper quantum meruit question submits these elements. *See* State Bar of Tex., Texas Pattern Jury Charges PJC 101.42 (2000) (quantum meruit question) (Appendix D) *Myrex Indus.*, 126 S.W.3d at 550 (reciting jury question on quantum meruit).

None of these elements were submitted to the jury (and when the Wolhfahrts offered a question, *Holloway* objected), and the fourth element (just to name one) was not "conclusively established." "An issue is conclusively established when the evidence is such that there is no room for ordinary minds to differ as to the conclusion to be drawn from it." *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex. 1982). Considering the

abundant evidence that Holloway never expected to be paid for his legal services,[6] it was not "conclusively established" that Holloway was expecting to be paid for his legal services by the Wohlfahrts.

Furthermore, in a quantum meruit action, the proper measure of damages is the reasonable value of the services rendered or the materials furnished, not the amount of any "fees." *See PIC Realty Corp: v. Southfield Farms, Inc.*, 832 S.W.2d 610, 616 (Tex. App.—Corpus Christi 1992, no writ); *M.J. Sheridan & Son v. Seminole Pipeline Co.*, 731 S.W.2d 620, 625 (Tex. App.—Houston [1st Dist.] 1987, no writ); *Air Conditioning, Inc. v. L.E. Travis & Sons*, 578 S.W.2d 554, 556 (Tex. Civ. App.-Austin 1979, no writ). Thus, a proper quantum meruit damages question asks the "reasonable value" of the services or materials, State Bar of Tex., Texas Pattern Jury Charges PJC 110.6 (200 (Appendix E). Question 2A does not.

Instead, it is a standard question on attorney's fees. *See* State Bar of Tex., Texas Pattern Jury Charges PJC 110.4 (Appendix F). Question 2A asks the jury what it finds "to be

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[6] *See* RR X, 190, 195 (Holloway never sent the Wohlfahrts a bill); RR VIII, 206 (Holloway never asked the Wohlfahrts to pay for his legal services until the time he filed his lawsuit); RR IV, 21, 29, 30; V, 11, 70 (Holloway would not charge Wohlfahrts for his services); RR V, 106 (Dr. Wohlfahrt and Holloway did not intend to charge each other); RR V, 98-99 (Holloway never said he would bill the Wohlfahrts or mentioned any sort of contingency fee); RR XI, 11 (Holloway never discussed charging the Wohlfahrts a fee for his services on any of the legal mattes he handled for them); RR V, 133, 134, 145, 171; VIII, 117-18, 123-24, 221; IX, 239; X, 60, 187, 195, 225; XI, 11 (during entire duration of bartering agreement, Holloway never sent the Wohlfahrts a bill for his services); RR V, 171 (Wohlfahrts had no idea Holloway was going to charge them anything); RR X, 187 (Mrs. Wohlfahrt never expected a bill from Holloway for his legal services); RR IV, 8, 11, 21, 29, 30; V, 11, 17, 44, 60, 168; VIII, 62, 64, 116, 131, 135, 218; X, 186, 190, 188, 223 (parties had bartering agreement)

a reasonable attorney's fee for the necessary services rendered by [] Holloway in handling each of the following legal matters, stated in dollars and cents." CR 803. The instruction, which follows the blanks for the jury's answers, advises the jury only on how to determine what a "reasonable attorney' fee" is (CR 805); it does not address the elements of a quantum meruit claim. The one subject the instruction addresses (a "reasonable attorney's fee") is not part of a quantum meruit claim at all.

Judge Reiter converted a conventional attorney's fees question into a judgment for "the value" of Holloway's fees, and he did so after the jury had found there was no agreement to pay Holloway for his services in the first place. Holloway received neither a liability finding nor a damages finding on his claim, yet still recovered. The court of appeals was right to reverse his purported quantum meruit award.

B. Holloway's Arguments For A Quantum Meruit Recovery Are Incorrect.

Holloway asserts that there is "uncontroverted evidence" that the Wohlfahrts owe him attorney's fees. Holloway's PFR at 2. As shown above, the record is full of evidence that they did not.[7]

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[7] *See* RR X, 190, 195; RR VIII, 206; RR IV, 21, 29, 30; V, 11, 70; RR V, 106; RR V, 98-99; RR XI, 11; RR V, 133, 134, 145, 171; VIII, 117-18, 123-24, 221; IX, 239; X, 60, 187, 195, 223; XI, 11; RR V, 171; RR X, 187; RR TV, 8, II, 21, 29, 30; V, 11,17,44, 60,168; VIII, 62, 64, 116, 131,135, 218; X, 186,190, 188, 223. Descriptions of this evidence are found above on page two and on page seven, footnote six.

Dr. Wohlfahrt testified that the Wohlfahrts provided Holloway a retainer once to cover expenses on a case that was outside the bartering agreement, and that Holloway handled another case for them for whatever the court allowed in attorney's fees. RR V, 41, 61, 62, 66. Mrs. Wohlfahrt testified that there were "a couple of instances" in which Holloway asked for funds because he said the legal matter would take more money than usual to resolve, and the Wohlfahrts would give if to him. RR VIII, 86;

Holloway also contends that the Wohlfahrts waived any complaint about Question 2A and its instruction by not objecting to them. Holloway's PFR at 8, 12, 16. There was no need to object. As discussed above, Question 2A is a standard attorney's fees question, and Holloway had both pled and requested the submission of a question on his theory that he and the Wohlfahrts agreed to enter into an attorney-client relationship whereby the Wohlfahrts were to pay him for his reasonable and necessary legal services. CR 284-96, 303-06, 808; RR XI, 93. Thus, it was proper for the jury to receive a standard question on attorney's fees, which is exactly what Question 2A is.

Holloway also claims that the Wohlfahrts waived any complaint about the jury's answer to Question 2A by not filing a motion for new trial attacking the verdict on factual or legal insufficiency grounds. Holloway's PFR at 13. The Wohlfahrts filed a timely motion to modify from the trial court's June 26, 2003 judgments and a timely motion to modify from the trial court's September 24, 2003 judgments. CR 976, 1251. In their motions, the Wohlfahrts did not attack the jury's "findings" in Question 2A because those "findings" are immaterial. The jury specifically found that there was no contract for the Wohlfahrts to pay Holloway for his legal services. CR 808. Thus, any purported amounts the jury found as Holloway's reasonable attorney's fees are irrelevant. In fact, they are irrelevant for an additional reason—the jury was not asked whether the Wohlfahrts had breached any contract to pay Holloway for his services. There was no

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See RR VIII, 113, 117. Also, from time to time Holloway would tell the Wohlfahrts that he needed money for such things as filing fees, copying, or to settle a case, and the Wohlfahrts would provide it. RR VIII, 223; RR X, 162-63, 186-87. Whenever Holloway needed money to work on a file, he would tell the Wohlfahrts; otherwise, the Wohlfahrts would pay him nothing. RR VIII, 223; RR X, 190. But neither Dr. Wohlfahrt nor Mrs. Wohlfahrt ever testified that they paid Holloway any attorney's fees, particularly not for a case within the "bartering agreement."

reason for the Wohlfahrts to challenge the jury's "findings" in Question 2A.[8]

Holloway further says that, "If a cause of action consists of more than one element and the court omits one element Without objection, then the error is waived and the unsubmitted elements are found in support of the judgment." Holloway's PFR at 10. Quantum meruit consists of four elements, none of which were submitted to the jury. Thus, the unsubmitted elements cannot be found in support of the judgment. *See* TEX. R. CIV. P. 279.

Last, Holloway suggests that the court of appeals should have remanded his purported quantum meruit claim, because the "quantum meruit issue [was] erroneously withheld" and because Question 2A is a "defective issue." Holloway's PFR at 14, 15. But it was Holloway himself who refused a quantum meruit issue. RR VIII, 230; RR XI, 119-20; CR 1313 (evidence). And Question 2A was not a "defective issue," but a proper attorney's fee question; it is only "defective" here because it cannot constitute the basis for a quantum meruit award.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE WOHLFAHRTS HAD NO DUTY TO OBTAIN A FINDING ON THE DISCOVERY RULE.

Holloway relies on *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515 (Tex. 1988), to argue that the Wohlfahrts' DTPA

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[8] Similarly, Holloway claims that the Wohlfahrts waived any complaint about the jury's answer to Question 2A by not bringing a factual or legal insufficiency challenge in the court of appeals. Holloway's PFR at 13. Such challenges were unnecessary (and inconsistent with the Wohlfahrts' challenge to the real error). Judge Reiter awarded a quantum meruit recovery without a quantum meruit liability finding or even a quantum meruit liability question. Thus, even if Question 2A was a quantum meruit damages question (and it was not), the jury's answer to it would have been irrelevant.

counterclaim is barred by limitations because the Wohlfahrts did not prove and obtain jury findings on the discovery rule. Holloway's PFR at 18. He omits from his excerpt the very first of this Court's holdings:

> The statute of limitations is an affirmative defense. TEX. R. CIV. P. 94. *The defendant thus bears the initial burden to plead, prove and secure findings to sustain its plea of limitations.*

769 S.W.2d at 517 (emphasis added).

Regarding that "initial burden," Holloway neither proved limitations nor, more importantly, obtained a finding on it. As *Woods* states, *once the defendant establishes as a matter of law that the plaintiffs cause of action is barred, then* the plaintiff has the burden to obtain findings to defeat the limitations defense. 769 S.W.2d at 518. Because Holloway did not discharge his "initial" burden, the obligation he says the Wohlfahrts had never arose. *See id., Tony's Tortilla Factory, Inc. v. First Bank*, 857 S.W.2d 580, 590 (Tex. App.—Houston [1st Dist.] 1993), *aff'd in part, rev'd in part on other grounds*, 877 S.W.2d 285 (Tex. 1994); *Metal Structures Corp. v. Plains Textiles, Inc.*, 470 S,W.2d 93, 99 (Tex. Civ. App.—Amarillo 1971, writ ref d n.r.e.).

Holloway did not request a limitations question. The law is clear that, when the defendant does not ask that the issue of limitations be submitted to the jury, the defense is waived. *Roberts v. Holmes*, 412 S.W.2d 947, 949 (Tex. Civ. App.—Eastland 1966, no writ),

Holloway also says dial the Wohlfahrts' "trial pleading did not plead the discovery rule or when they discovered the counterclaims," Holloway's PFR at 17. The discovery rule is a plaintiffs *defense* to limitations. *PPG Industries v. JMB/Houston Ctrs. Partners Ltd. Partnership*, 146 S.W.3d 79; 86 n.24 (Tex. 2004). It postpones a claim's accrual until the plaintiff knew, or with the exercise of reasonable

diligence should have known, of the wrongful act and its resulting injury, *S.V. v. R.V.*, 933 S.W.2d 1, 4, 6 (Tex. 1996).

As such, a plea of the discovery rule would be in the party's actual claim (here counterclaim), as a defense to the answering party's defense of limitations. *See, e.g., US MCT, Inc. v. Brodsky*, 2001 WL 1360301 at 6 (Tex, App.—Dallas 2001, no pet.) (not designated for publication) (discovery rule pled in party's counterclaim, not in its answer). Hence, the Wohlfahrts pled the discovery rule (and when they discovered the counterclaims) in their third amended (live) counterclaim. CR 530-31, 547. It makes no more sense for the Wohlfahrts' plea of the discovery rule to be in their answer than it does for Holloway's plea of limitations to be in his petition.

While the Wohlfahrts; did not submit any issues on the discovery rule, it was not necessary for them to do so, under *Woods* and the other cases cited above, they had no burden to submit their defense to limitations unless Holloway submitted his limitations defense. He did not. Thus, the Wohlfahrts had no burden (and no need) to submit their discovery rule defense to the jury.

III. THE COURT 00 APPEALS CORRECTLY HELD THAT THE WOHLFAHRTS' COUNTERCLAIM WAS TIMELY.

The law of the case doctrine is "the principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages." *City of Houston v. Precast Structures, Inc.*, 60 S.W.3d 331, 337 (Tex. App.—Houston (14th Dist.] 2003, pet denied).[9]

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[9] Plainly, the "court of last resort" language does not prevent an intermediate court of appeals from applying the doctrine to an opinion from an intermediate court of appeals. *Meininger v. Lufkin Fed. Say. & Loan Assn'n*, 1997 WL 583065 at 13 (Tex. App.—Amarillo 1997, pet. denied) (not designated for publication) (citing 6 Tex. Jur. 3d Appellate Review § 909 (1980); *Manziel v. Humble Oil & Ref. Co.*, 214 S.W.2d

Whether limitations bars a claim is a question of law. *See Philips v. Giles*, 620 S.W.2d 750, 751 (Tex. Civ. App.—Dallas 1981, no writ); *Shell Oil Co. v. State*, 442 S.W.2d 457, 458 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.). Thus, the law of the case doctrine applies to a holding on limitations. *See Gaynier v. Ginsberg*, 1999 WL 173679 at 6 (Tex. App.—Dallas 1999, pet. denied) (not designated for publication); *See also Cedillo v. Gaitan*, 981 S.W.2d 388, 390 (Tex. App.—San Antonio 1998, no pet.). The First Court of Appeals held that the Wohlfahrts' DTPA counterclaim was not barred by limitations. *Wolhlfahrt*, 2001 WL 84212 at 1-5.

Application of the law of the case doctrine is flexible and must be left to the discretion of the court and determined according to the particular circumstances of the case. *Precast Structures*, 60 S.W.3d at 337. Here, as in *Precast Structures*, the issue of limitations was clearly "a significant issue both in the trial court and on the first appeal" (the First Court reversed the entire judgment solely on the limitations issue); the issue was likewise "clearly decided" in the first appeal; and there was no "substantial change of fact" between the two trials on the limitations issue. *See id.* at 338. The law of the case doctrine applies.

Furthermore, the statute of limitations is an affirmative defense. *Woods*, 769 S.W.2d at 517. Thus, the defendant must plead, prove, and secure findings to sustain the defense of limitations. *Id.* When the defendant does not request that the issue of limitations be submitted to the jury, the defense is waived. *Roberts*, 412 S.W.2d at 949.

That is the case here. Holloway did not sustain his twin burdens of proving and obtaining a finding on limitations; in fact, he did not request that a limitations issue be submitted to

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797, 798 (Tex. Civ. App.—Texarkana 1948, writ ref'd n.r.e.)). Intermediate courts of appeals routinely apply the doctrine to the opinion of an intermediate court of appeals.

the jury. On the contrary, he specifically argued that a jury cannot determine the facts relevant to a limitations defense. RR XI, 119.

Last, as the First Court of Appeals held, the Wohlfahrts' counterclaim was not barred by limitations. In December 1993, the Wohlfahrts filed a counterclaim for the value of Dr. Wohlfahrt's services. CR 64-67; *Wohlfahrt*, 2001 WL 84212 at 1. In May 1995, the Wohlfahrts amended their counterclaim to include their DTPA claim, CR 133-64; *Id.* at 1.

Under section 16.068' of the Texas Civil Practice and Remedies Code, a cause of action that would otherwise be time-barred "relates back" to an earlier timely-filed pleading "unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence." Tex. Civ. Prac. & Rem. Code Ann § 16,068 (Vernon 1997). As the parties agreed (CR 213-21), the Wohlfahrts' counterclaims were compulsory, because they arose out of the same transaction or occurrence as Holloway's claims. *Wohlfahrt*, 2001 WL 84212 at 2 n.2, 4; *See Barraza v. Koliba*, 933 S.W.2d 164, 167-68 (Tex. App.—San Antonio 1996, writ denied); Tex. R. Civ. P. 97(a). Thus, even if the DTPA claim was barred by the two-year statute of limitations when it was filed in May 1995, it would "relate back" to the first counterclaim, which was filed in December 1993, well within two years of the time the Wohlfahrts pled that they discovered their cause of action in 1992. *Wohlfahrt*, 2001 WL 84212 at 4.

IV. THE WOHLFAHRTS CHALLENGED THE JNOV ON APPEAL.

Holloway says that the Wohlfahrts did not attack the JNOV on appeal. Holloway's PFR at 20, 21. (There was no separate order granting a JNOV.) In the motion to modify they filed after Judge Reiter nullified the jury's DTPA award, the Wohlfahrts clearly challenged the nullification of the jury's DTPA findings. CR 1251-54. It is plain that they did so in

their opening brief, as well. Section 11 of the Appellants' Brief is entitled, "The Wohlfahrts are Entitled to Recover Their DTPA Damages." Appellants' Brief at 29. The Wohlfahrts discussed the jury's DTPA findings and then said that "Judge Reiter disregarded the jury's DTPA findings and ordered that the Wohlfahrts take nothing on their 'time-barred' counterclaims" Appellants' 'Brief at 29. Then the Wohlfahrts spent 16 pages arguing that their DTPA counterclaim is not barred by limitations and that they are entitled to their DTPA damages. Appellants' Brief at 29-45. The Wohlfahrts challenged Judge Reiter's ruling.

V. THE WOHLFAHRTS DID NOT WAIVE THEIR DTPA CLAIM BY FORGOING A LEGAL MAL-PRACTICE CLAIM.

Citing *Kahlig v. Boyd*, 980 S.W.2d 685 (Tex. App.—San Antonio 1998, pet. denied), Holloway says that "[t]he abandonment of a legal malpractice claim precludes a deceptive trade practice claim." Holloway's PFR at 2. The opinion in *Kahlig* does not support that premise, although one of its headnotes comes close. However, "It should go without saying that headnotes are not part of an opinion." *Mantis v. Resz*, 5 S.W.3d 388, 390 n.3 (Tex. App.—Fort Worth 1999, pet. denied). The opinion itself does not say that without a legal malpractice claim, there can be no recovery under the DTPA, and the law is to the contrary. *See Latham v. Castillo*, 972: S.W.2d 66, 69 (Tex. 1998); *Ford Motor Co. v. Gonzalez*, 9 S.W.3d 195, 200 (Tex. App.—San Antonio 1999, no pet.).

CONCLUSION AND PRAYER FOR RELIEF

The Wohlfahrts respectfully ask the Court to deny Holloway's petition for review.

Respectfully submitted,

Martin, Disiere, Jefferson & Wisdom, L.L.P.

/s/ Levon G. Hovnatanian
LEVON G. HOVNATANIAN
State Bar No. 10059825
RAUL H. SUAZO
State Bar No. 24003021
KEVIN G. CAIN
State Bar No. 24012371
MELINDA L. MCGEHEE
State Bar No. 24041443
808 Travis, Suite 1800
Houston, TX 77002
(713) 632-1700 - Telephone
(713) 222-0101 - Facsimile

CERTIFICATE OF SERVICE

This is to certify dud a true and correct copy of the above response to petition for review has been forwarded to respondent/cross-petitioner Mr. John Holloway (who represents himself) via hard delivery on this 9th day of January, 2006, by hand-delivering it to the following:

Mr. John H. Holloway
10031 Timberoak Drive
Houston, Texas 77070

/s/ Levon G. Hovnatanian
LEVON G. HOVNATANIAN

APPENDIX G

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS

RE: Case No. 05-0803 DATE: 12/16/2005
COA #: 01-99-00205-CV TCJ: 98-10256
STYLE: JOHN H. HOLLOWAY
v. DOUGLAS AND LYNN WOHLFAHRT

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Today the Supreme Court of Texas denied as redrafted the petition for review in the above-referenced case.

MAIL TO:

MR. JOHN H. HOLLOWAY
ATTORNEY AT LAW
10031 TIMBEROAK DRIVE
HOUSTON TX 77080

G-1

C013

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS

RE: Case No. 05-0836 DATE: 4/21/2006
COA #: 14-03-01004-CV; 14-03-01139-CV TCJ: 98-10256
STYLE: DOUGLAS WOHLFAHRT, M.D. AND LYNN WOHLFAHRT
v. JOHN H. HOLLOWAY

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

denied 4-21-06

MAIL TO:

MR. JOHN H. HOLLOWAY
ATTORNEY AT LAW
10031 TIMBEROAK DRIVE
HOUSTON TX 77080

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C013

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